

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

OGLALA SIOUX TRIBE'S RESPONSE IN OPPOSITION TO
NRC STAFF MOTION FOR SUMMARY DISPOSITION
OF CONTENTIONS 1A AND 1B

Pursuant to 10 C.F.R. § 2.1205, the Oglala Sioux Tribe (Tribe) hereby submits this Response in Opposition to the NRC Staff's Motion for Summary Disposition of Contentions 1A and 1B. Incorporated in this Response is the Tribe's objection to NRC Staff's Statement of Material Facts in support of its Motion for Summary Disposition.

A. Summary Disposition Standards

10 C.F.R. § 2.1205(c) states, "[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part." Subpart G, Section 2.710(d)(2), provides, "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." As conceded by NRC Staff, the moving party carries the burden of showing that it is entitled to summary disposition. Motion at 7.

Applicable NRC standards governing summary disposition are set forth in 10 C.F.R. § 2.710. The standards are based upon those the federal courts apply to motions for summary

judgment under Rule 56 of the Federal Rules of Civil Procedure. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

Summary disposition is appropriate where relevant documents and affidavits “show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.710(d)(2).

The correct inquiry is whether there are material factual issues that “properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). At issue is not whether evidence “unmistakably favors one side or the other,” but whether “there is sufficient evidence favoring the non-moving party” for a reasonable trier of fact to find in favor of that party. *Id.* at 249-252.

In ruling on a motion for summary disposition a licensing board (or presiding officer), “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing].” *Id.* at 249. “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255. If “reasonable minds could differ as to the import of the evidence,” summary disposition is not appropriate. *Id.* at 250-51. Summary disposition is not appropriate if it would require a licensing board to engage in the making of “[c]redibility determinations, the weighing of evidence, [or] the drawing of legitimate inferences from the facts.” *Id.* at 255. Caution should be exercised in granting summary disposition, which may be denied if “there is reason to believe that the better course would be to proceed to a full [hearing].” *Id.*

B. The Facts Presented by NRC Staff are Disputed

NRC Staff asserts that there are no genuine issues of material fact. NRC Staff Motion for Summary Disposition (“Motion”) at 2, 18. In one respect, that is correct. There is no dispute

that NRC Staff has conducted no further cultural resource surveys or other substantive effort to identify, analyze impacts to, or develop mitigation for cultural resources at the proposed mine site. NRC has proffered no survey, analysis, or other evidence that could rehabilitate the NHPA and NEPA violations. Because NRC Staff failed to address the issues identified by the ALSB and Commission, denial of the Motion based on NRC Staff's failure to proffer any evidence of NEPA and NHPA compliance is proper result. As NRC represented to the D.C. Court of Appeals, "the ongoing adjudication could potentially result in modification or revocation of the already-issued license." NRC Initial Brief at 8 (ML17227A161).

The facts presented by NRC Staff focus on the same underlying dispute over cultural resources surveys presented at the hearing in Rapid City and are contested. The Statement of Material Facts submitted by NRC Staff contains numerous mischaracterizations and incomplete descriptions of the phone calls, emails, and other underlying events that NRC Staff relies upon to justify its unilateral abandonment of discussions with the Tribe as to an acceptable process for a cultural resources survey. The Tribe informed NRC Staff by email that it objected to NRC Staff's Statement of Facts. See Exhibit 5 attached hereto.

C. Material Facts

Contrary to NRC Staff's narrative, the only evidence NRC Staff provides is an incomplete account of events that NRC Staff has embellished with unsupported assertions, and disputed facts. The Tribe's chronological account of these activities confirms a dispute over the facts leading up to NRC Staff's unilateral decision to abandon NHPA consultation and forgo any supplemental NEPA review.

1. On April 30, 2015 Board issued its Decision and ordered NRC Staff to remedy the deficiencies.

2. NRC Staff did not contact the Tribe and the Motion identifies no effort to address the cultural resources issues before filing its May 30, 2015 petition for Commission review.
3. During the pendency of the Commission review, the following events occurred, none of which included any substantive NRC Staff proposal or resources committed toward remedying the substantive deficiencies identified by the Board Decision:
 - a. On June 23, 2015, NRC Staff sent a letter to the President of the Oglala Sioux Tribe seeking government-to-government consultation. The email was copied to all counsel.
 - b. On July 22, 2015, OST sent a letter seeking to move the consultation forward and asked NRC Staff to identify the NRC officials that would be involved. The email covering the letter was copied to all counsel.
 - c. On August 26, 2015, NRC Staff sent a letter identifying the new NRC Staff new management team and claiming that NRC Staff was moving forward with NHPA and NEPA reviews. The letter was copied to all counsel.
 - d. On September 24, 2015 OST sent a letter to NRC Staff seeking to set up a meeting that requested a range of dates when NRC could attend. The email was copied to all counsel.
 - e. Between September 24, 2015 and November 30, 2015, NRC Staff allegedly made calls and sent emails to the President and individual Tribe Staff, but identifies no attempt to call or include the Tribe's Counsel in the present matter. Motion at 21.
 - f. On November 30, 2015, NRC Staff sent an email to the Tribe's Counsel responding to the September 24, 2015 letter. The email was copied to all counsel.

- g. On December 1, 2015, the Tribe's Counsel responded by email that included NRC Staff's new management team stating that the NRC Staff had not identified any availability for a meeting, and restating that request. The email was copied to all counsel. The email from the Tribe's Counsel stated that because "this matter is part of an ongoing adjudicatory matter and in an effort to ensure efficient communication between the parties, please copy Mr. Stills and myself on future letters." Exh. 2.
- h. On December 17, 2015, NRC Staff sent a letter that responded to the Tribe's September 24, 2015 request for dates when NRC's new management team could attend an in-person meeting. The email was copied to all counsel.
- i. On February 10, 2016, counsel for NRC Staff sent an email announcing that a new legal team had been assigned to this matter, and sought an update on the efforts to schedule a meeting.
- j. On March 24, 2016, after a series of calls and emails were exchanged between staff and counsel during February and March, the Tribe's Counsel sent NRC Staff Counsel an email identifying, among others, the week of May 16, 2016 as a mutually-acceptable time and place for an initial meeting. The email confirmed that the Tribe's relevant staff had also changed after a substantial reorganization of the Tribal Historic Preservation Office. Exh. 3
- k. Between March 24 and May 2, 2016, a series of emails set the specific time, place, and agenda for the meeting. Exh. 3
- l. On May 19, 2016, the Tribe's Staff and NRC Staff held a face-to-face meeting. NRC Staff's June 1, 2016 Status Report stated: "The purpose of the meeting was

twofold: (i) to introduce the NRC's new management team responsible for the consultation process with the Oglala Sioux Tribe, and (ii) to start the dialogue, on a government-to-government basis, regarding a path forward for consultation with the Oglala Sioux Tribe." ML16153A448. The meeting summary confirmed that "[t]his meeting constituted the first step and building block for moving forward with the consultation process to gather information about historic and cultural resources of significance to the Oglala Sioux Tribe that could be affected by the construction and operation of the Dewey-Burdock in situ uranium recovery (ISL) project located in Fall River and Custer Counties, South Dakota." ML16182A069 at 1. The meeting notes conclude by stating, "[w]ith respect to the survey, the Oglala Sioux Tribe noted that the tribal survey conducted in 2013 was incomplete and the survey methodology lacked scientific integrity. The Oglala Sioux Tribe asked that additional comprehensive and meaningful surveys be conducted and that other Tribes should also be involved. The NRC discussed the possibility of another survey opportunity and clarified that coordination with the licensee would be necessary to gain access to the project site." *Id.* NRC Staff provided no evidence to establish the extent the licensee influenced and/or directed the substance of NRC Staff's position during consultation.

- m. Beginning on August 16, 2016, more than two and half months after the face-to-face introductory meeting, NRC Staff allegedly made a series of calls and emails to the Tribe's Staff asking only about tribal ordinances. Despite the explicit request made in December of 2015, NRC Staff's emails did not copy the Tribe's

Counsel or NRC Staff Counsel. NRC Staff provided no information regarding any effort to address cultural resource issues raised by the Tribe.

- n. On October 13, 2016, the Board issued a Memorandum and Order Requesting Scheduling Information for Telephone Conference Call. ML16287A631. The Order recounted the Board's April 30, 2015 Order finding violations of the NHPA and NEPA and that "these deficiencies could be remedied, if the NRC Staff initiated government-to-government consultations to supplement the FSEIS and the Record of Decision." *Id.* at 1-2. The Board also stated that "[w]ith the exception of a 'face-to-face' meeting on May 19, 2016, the status reports filed by NRC Staff do not reflect significant progress towards resolving the deficiencies identified by the Board. In fact, after seventeen months, the parties have only engaged in stakeholder introductions and the 'start' of dialogue." *Id.* at 2.
- o. On October 24, 2016, the Board issued an Order Scheduling Telephonic Status Conference, setting a conference call for November 7, 2016 and setting forth a list of issues to be discussed. ML16298A331.
- p. On November 7, 2016, the parties held a conference call status conference with the Board. ML16314A843 (Transcript). During the conference call, OST counsel explained that after the May 19, 2016 meeting, the Tribe had expected, and was awaiting, a response from NRC Staff as to whether NRC Staff was interested in moving forward with discussing the parameters of a new survey, revisiting the PA, and reviewing the effectiveness of the license. *Id.* at 18-20. Counsel for NRC Staff stated that this was an accurate statement and NRC Staff was interested in further discussions as to conducting a survey. *Id.* at 21, lines 16-23. Counsel for

NRC Staff indicated that NRC Staff would send a letter to the Tribe with their response to the Tribe's requests made at the May 19, 2016 meeting before the end of the calendar year, and potentially during November 2016, some six and a half months after the May 19, 2016 meeting. Chairman Froehlich inquired about the apparent discrepancies in the level of activity between the case at bar and the Crow Butte Resources case, where the monthly reports in the Crow Butte case demonstrate weekly phone calls, the development of a Statement of Work, and the engagement of an independent contractor to conduct and facilitate cultural resources reviews. *Id.* at 23-24. In explaining the discrepancy, counsel for NRC Staff explained that NRC Staff had "resource issues" and "for some reason" had given priority to the Crow Butte Resources case "to the potential detriment" of this case. *Id.* at 24, lines 8-12. NRC Staff counsel opined, without citation to any authority, that because consultation was ordered in the case at bar, but not Crow Butte Resources, coordination with the Oglala Sioux Tribe somehow means that "hiring a contractor is not an adequate substitute for obtaining that information on traditional cultural properties." *Id.* at 25, lines 3-10. In response to questions from the Board, Mr. Frankel, who is counsel to a non-tribal party in the Crow Butte Resources case stated that the talks had broken down in that case, largely, in his opinion, because, contrary to the initial expectation of the parties, the contractor costs would have to be borne by the applicant, who had already spent some \$300,000 on cultural resources surveys and related work at the Crow Butte site. *Id.* at 26. In response to questions from Chairman Froehlich to the Tribe's Counsel about the status of discussions regarding a survey, the Tribe's Counsel

explained that the Tribe had suggested to NRC Staff at the May 19, 2016 meeting that conducting a new survey was the appropriate way to resolve the issues identified in the Board's ruling and that NRC Staff was expected to consider the Tribe's request and respond. *Id.* at 33, lines 11-25. Counsel for Powertech stated that it had been in contact with NRC Staff following the May 16, 2016 meeting between NRC Staff and the Tribe, but had also not heard back from NRC Staff. *Id.* at 36, lines 20-25; at 37, lines 1-3. Counsel for Powertech subsequently informed the parties that the company would only be amenable to offering the precise "same parameters" for an open site survey that had previously been rejected by every single Sioux tribe. *Id.* at 37, lines 24-25; at 38, lines 1-2. Counsel for Powertech then stated the company's position that "above that, our position is we don't think anything else is necessary associated with this." *Id.* at 38, lines 3-9. The Tribe's Counsel responded that this was the first time the Tribe had heard the company would not accept any additional survey work on any terms beyond the unacceptable terms previously offered and expressed the Tribe's position that it hoped NRC Staff would not allow Powertech to dictate the terms of the survey and the government-to-government consultation process. *Id.* at 38, lines 19-23. The Tribe's Counsel reiterated that the Tribe had previously put together a survey methodology and protocol that NRC Staff had rejected without explanation and reiterated that a NRC Staff response to that proposal would be a logical starting point for further discussions. *Id.* at 40-41. Counsel for NRC Staff stated that NRC Staff would be willing to consider alternate approaches to the open site approach. *Id.* at 42, lines 18-21. The Tribe's Counsel similarly

indicated that the Tribe remained willing to consider and negotiate a viable approach. *Id.* at 44, line 20-25. Counsel for NRC Staff stated that NRC Staff “hoped to continue discussions with the Oglala Sioux Tribe regarding the potential site visit, regarding any other methodologies that they may wish to put forward for the provision of information on these cultural resources’ importance to the Tribe.” *Id.* at 54, lines 19-24.

- q. On November 23, 2016 NRC Staff sent an email invitation to carry out follow-up discussion on matters discussed on the May 19, 2016 meeting. Some counsel, but not all, were copied on the NRC Staff email. NRC alleges it engaged in a series of calls and emails, none of which included counsel. The letter requested a response within 30 days.
- 4. On December 23, 2016, the Commission issued CLI-16-20, which upheld the Board rulings relevant to the present Motion. As noted throughout NRC Staff’s pending Motion, NRC Staff’s efforts were set forth in the briefing, and were found insufficient to meet NRC’s NEPA, NHPA, and government-to-government consultation duties.
 - a. On January 13, 2017, having reviewed the Commission Decision, the Tribe’s Staff confirmed availability for a meeting to discuss NRC Staff’s progress and plan, if any, to meet the duties set out in the Commission Order. The invitation again expressed the need to involve other Sioux tribes in the cultural resource identification process and sought NRC Staff’s input on how it would meet NRC duties in light of Powertech’s stated position that it would not reimburse NRC Staff for time spent complying with the Board and Commission Orders.

- b. Upon information and belief, NRC Staff has in its possession but has not provided in Monthly Reports, emails, letters, invoices, and other documents related to Powertech's refusal to pay for NRC Staff time spent complying with the Board and Commission Orders
- c. On January 31, 2017, NRC Staff, Tribe's staff, and counsel, participated in a conference call that mostly reiterated the concepts discussed in May 2016. The call confirmed that NRC Staff would not consider any proposal that exceeded Powertech's willingness and ability to pay. The summary notes from the call specify NRC Staff's proposal for an open-site survey based on the precise same parameters rejected by the Tribe for years, and insisted on by Powertech. ML17060A260 at 1. The notes reflect the Tribe's "commitment to work with the NRC and its desire to reach an agreement on a survey of the license area that identifies the Oglala Sioux and other Tribes' cultural resources and traditional cultural properties impacted by the Dewey-Burdock project. The Oglala Sioux Tribe expressed its preference to develop a survey methodology similar in nature to the Makoche Wowapi survey proposal that was submitted to the NRC in September 2012. The Oglala Sioux Tribe stated its opinion that NRC Staff never provided input on the methodology set out in the Makoche Wowapi proposal, which the Oglala Sioux Tribe proposed should serve as the basis for future discussions of a methodologically sound survey. The Oglala Sioux Tribe also stated its desire to include other interested Tribes in the development of the survey approach and recommended that those Tribes participate in conducting the tribal survey." *Id.*

- d. During February and March of 2017, NRC Staff and OST counsel and staff exchanged a series of emails related to the January 31, 2017 call summary and scheduling a follow-up meeting in April. Exh. 3. In this exchange, on March 17, 2017, the Tribe informed NRC Staff that it was working to coordinate a position on a survey approach and would be in contact as soon as possible. Exh. 3.
- e. On April 14, 2017, less than a month after the Tribe reiterated its commitment to provide the NRC Staff information as soon as possible, NRC Staff sent a letter describing the same open-site approach limiting a survey to two weeks and excluding all other tribes. The Tribe had repeatedly informed NRC Staff, even as recently as the January 31, 2017 call, that the open site approach was not based on any recognized discipline or methodology and was therefore unacceptable. ML17103A500. The letter demanded the Tribe take a firm position on whether OST would accept or reject NRC's proposal and respond no later than May 5, 2017.
- f. Unbeknownst to the Tribe, on April 13, 2017, the survey terms proposed in the April 14, 2017 NRC Staff letter to the Tribe was sent in draft form to representatives of Powertech for the company's input and edits. ML17116A204. The NRC Staff email to the company references unspecified prior discussions between NRC Staff and Powertech demonstrating a coordination on approach to the Tribe, such that NRC Staff and Powertech were working in coordination relating to the purported "government-to-government" consultation. *Id.* Nowhere in the NRC Staff's Statement of Material Facts or Affidavit are these prior discussions described or detailed, leaving significant gaps in the factual record.

The company did respond via email, with a severely edited version of the survey proposal, primarily eliminating available dates, adjusting the two-week time period to a potentially shorter time, eliminating categories for financial reimbursement, and specifying that the Tribe must “work directly with Powertech to receives (sic) the compensation described.” ML17116A209. Each of the edits commanded by Powertech were incorporated into the final letter to the Tribe, purporting to be from NRC Staff. ML17103A500.

- g. On April 28, 2017, the Tribe’s Counsel sent an email to NRC Staff and counsel explaining that some staff changes and issues had arisen within the Tribe’s Tribal Historic Preservation Office, including the unexpected departure of the Tribal Historic Preservation Officer Ms. Lone Hill, that would render it unrealistic for the Tribe to respond to the April 14, 2017 letter by NRC Staff’s unilaterally-imposed May 5, 2017 deadline. The Tribe’s Counsel reiterated the Tribe’s commitment to continue the dialogue, and despite NRC Staff’s failure to address previous survey proposals, to provide NRC Staff with a detailed response related to specific survey protocol components the Tribe would like to explore in discussions with NRC Staff. Exh. 4. NRC Staff’s steadfastly insisted on a proposal that appeared identical to the proposals repeatedly rejected by every singly Sioux tribe. *Id.* The email again requested, as the Tribe had since at least December 2015, that NRC Staff include the Tribe’s Counsel on all communications with the Tribe’s staff involving matters related to the Dewey-Burdock adjudication. *Id.*

- h. On May 8, 2017, NRC Staff counsel emailed the Tribe's Counsel explaining that NRC Staff had, without the knowledge of the Tribe's counsel and instead of contacting the Tribe's counsel, made "efforts" to contact the Tribe's Staff to determine the status of Ms. Lone Hill's office and the Tribal Historic Preservation Office. Exh. 4. NRC Staff counsel asserted, without identifying either the NRC Staff or the Tribe's Staff who engaged in the purported "efforts", that it was NRC Staff counsel's understanding that Ms. Lone Hill was back in the position of Tribal Historic Preservation Officer and was only out of the position for one week. *Id.* NRC Staff stated that it would re-issue the same April 14, 2017 letter, this time extending its deadline for a response to May 19, 2017. *Id.*
- i. On May 17, 2017, the Tribe's Counsel emailed NRC Staff and counsel thanking NRC Staff for the re-issued letter and correcting NRC Staff's erroneous understanding of the length of time of Ms. Lone Hill's departure from her position, confirming that the absence had begun April 12, 2017 and that the Office had been restored to full functionality only the week of May 15, 2017. Exh. 5. Further, the Tribe's Counsel explained to NRC Staff and counsel that the Tribe's resources were currently consumed with providing comprehensive comments to the recently issued Draft Underground Injection Control permits by Environmental Protection Agency ("EPA"), which had set May 19 as the formal deadline for submitting comments to the thousands of pages of materials included in the Draft permit package. *Id.* Subsequent to the May 17, 2017 email, EPA extended the deadline for submitting comments. Nevertheless, despite the work necessary to develop EPA comments preceding the extension of time, the Tribe's

Counsel and staff committed to providing a response to NRC Staff's letter by May 31, 2017. Exh. 4. On May 22, 2017, NRC Staff counsel responded to the Tribe's May 17, 2017 email accepting a May 31, 2017 response date.

ML17144A240.

5. During this period, the Tribe was also responding to the Commission Order issued on December 23, 2016 that triggered a 60-day deadline to seek judicial review. On February 21, 2017, the Tribe timely filed suit in the U.S. Circuit Court of Appeals for the D.C. Circuit requesting, among other relief, that the Court find unlawful and set aside NRC Staff's issuance of an effective license without first complying with NEPA, NHPA, and government-to-government consultation.
 - a. During February and March 2017, the Tribe, NRC, and Powertech engaged in considerable motions practice.
 - b. On March 17, 2017, without first conferring with the Tribe's counsel, NRC filed a motion to dismiss.
 - c. On March 24, 2017, the Tribe filed a response to NRC's motion to dismiss.
 - d. On May 17, 2017, the Court of Appeals entered an order allowing Powertech (Azarga) to intervene and referred the motion to dismiss to the motions panel assigned to hear the merits of the Tribe's lawsuit.
 - e. On May 18, 2017, the Court of Appeals issued an Order setting out a briefing schedule.
 - f. On September 21, 2017, the Tribe is scheduled to file its reply brief on the merits of the pending claims. NRC filed its response on August 10, 2017. Powertech

(Azarga) filed its response in support of NRC's filings on August 30, 2017. Oral argument and decision will occur on an as-yet undefined schedule.

- g. After the litigation was filed, NRC Staff made no serious effort to identify any means to remedy the substantive deficiencies identified by the Board or Commission Decision, but continued to demand the Tribe set out its position regarding the cultural resources survey.
6. On May 31, 2017, as promised, the Tribe sent NRC Staff a detailed response to NRC Staff's April 14, 2017 letter. ML17152A109. The Tribe's letter invited further discussions and sent NRC Staff a detailed, nine-page discussion that addressed NRC Staff's proposal and set out the parameters of what the Tribe saw as a lawful and methodologically sound approach to cultural resources survey. The letter repeatedly made clear that the content was offered as the basis for further discussions with NRC Staff and not an ultimatum, while expressing hope that NRC Staff's proposal was also not intended as an ultimatum, despite the repeated requests from NRC Staff to either accept or reject the proposal. *Id.* at 2. The Tribe's letter provided significant discussion as to the types of methodologies that the Tribe expected would be including in any NRC Staff courses of action to remedy the NEPA and NHPA violations, including references to the desire to engage a contractor to facilitate and coordinate a survey, with involvement of the other Sioux tribes – a position the Tribe had repeatedly expressed to NRC Staff. *Id.* at 3-4. The Tribe also described its strong desire to involve elders in the process, as well as the need for tribal members to carefully consider the survey findings and allow for subsequent trips to the site to ensure an accurate assessment. *Id.* at 4-5. Notably, the Tribe pointed out that the NRC Staff's own cultural resource expert

witnesses had affirmed that these types of protocols represent common, typical, and best practices. *Id.* at 6-7. The Tribe specifically addressed the fact that these protocols were inconsistent with a limited two-week open site approach proposed by Powertech and NRC Staff. *Id.* at 8. While the estimates from the testimony quoted for such a project ranged from 8 months to two years, the Tribe explained that it was not insisting on any specific length of time or timeline, but that the parties needed to engage in “a more detailed discussion of how these components can be incorporated in to a cultural resources survey approach.” *Id.* at 8. The Tribe recognized the Makoche Wowapi proposal as one that was previously proposed, but acknowledged that NRC Staff and the applicant were not ready to accept that extensive of an effort. *Id.* Lastly, the Tribe communicated its preference for face-to-face meeting and the role of the OST Tribal Council in formal government-to-government consultation, and thus invited NRC Staff, including the NRC Staff-delegated decision-maker, to consider an in-person meeting as was conducted in May of 2016 in order to facilitate much more progress that can typically be made on a conference call. *Id.* at 8-9

- a. On July 24, 2017, seven weeks after receiving the May 31, 2017 letter, and without making any calls or otherwise attempting to discuss the merits of the Tribe’s letter, NRC Staff sent a terse, two-page letter rejecting all further attempts to identify a cultural survey methodology that would form the basis to remedy the NRC’s Staff’s failure to satisfy NHPA, NEPA, and government-to-government consultation requirements. ML17205A063.
- b. The NRC Staff letter did not address the methodology or substantive aspects of the Tribe’s letter. The sole basis contained in the letter for the NRC Staff’s

decision to unilaterally abandon any effort at reaching a compromise was a one-sentence explanation that “[t]he positions you raised in your response, including but not limited to the length of the site survey, the survey methodology, and the requirement that the staff coordinate with the governments of all Lakota Sioux Tribes before designing a cultural resources survey, appear to be far apart from the discussions in the May 19, 2016, government-to-government meeting, the January 31, 2017, teleconference, and the reasonable opportunity to identify cultural resources described in the NRC staff’s letters dated April 14, 2017, and May 8, 2017.” *Id.* at 2. Nowhere does the NRC Staff letter address any of the substantive points, or what aspects of these categories are “far apart” from previous discussions. The letter fails to recognize the Tribe’s express acknowledgments in its May 31, 2017 letter that all of these aspects identified were open to discussion, including length of survey and survey methodology. Remarkably, the letter cites the Tribe’s desire to coordinate with other Sioux Tribe’s as an aspect “far apart” from the discussions in May of 2016 and January of 2017 – despite the specific references in the summary reports from those meetings reflecting the Tribe’s express statements that coordination with other tribes was an important component to the Tribe.

- c. The NRC Staff’s July 24, 2017 letter does not represent a good faith or reasonable attempt to comply with the NHPA or NEPA, nor to remedy the substantive deficiencies identified by the Board or Commission Decision.
7. On July 31, NRC Staff counsel emailed the Tribe’s counsel stating that NRC Staff believed the July 24, 2017 letter unilaterally rejecting any further discussion or

consultation with the Tribe represented a trigger pursuant to 10 C.F.R. § 2.323(a)(2) to file a Motion for Summary Disposition within 10 days and that it would be doing so on August 3, 2017. Exh. 5. The Tribe's counsel responded on August 2, 2017 explaining the Tribe's position that the July 24, 2017 letter should not be interpreted as a self-imposed trigger under 10 C.F.R. § 2.323(a)(2), and that the Tribe continued to believe there was significant opportunity for discussion and agreement on a survey approach. *Id.* The Tribe's Counsel explained that the text of the Tribe's May 31, 2017 letter clearly communicated that it contained no completely non-negotiable terms and expected NRC Staff to at least respond with specific bases for rejecting any approach other than Powertech's preferred open site approach. *Id.* On August 3, 2017, NRC Staff Counsel emailed, without elaboration, that NRC Staff "believe that filing the Staff's motion today remains the most appropriate step..." and that instead of responding to the Tribe in a consultation setting, the motion would provide the Staff's position regarding the additional factual matters you raise related to the Tribe's May 31, 2017 letter." *Id.* NRC Staff filed the Motion on the same day.

8. The Motion for Summary Disposition sets out only a partial set of material facts and information in NRC Staff's possession necessary to provide a complete picture of the NRC Staff's course of action in responding to the Board's decision to let NRC Staff conduct post-licensing activities to comply with the NHPA's duties to make reasonable efforts to identify cultural resources and engage in reasonable and good faith consultation with the Tribe.
 - a. Upon information and belief, NRC Staff has in its possession but has not provided in Monthly Reports, emails, letters, invoices, and other documents addressing

Powertech's refusal to pay for NRC Staff time spent complying with the Board and Commission Orders.

- b. Upon information and belief, NRC Staff has in its possession but has not provided, time sheets, billing sheets, receipts, and other documentation of the actual time and resources NRC Staff has spent addressing the substantive deficiencies identified by the Board or Commission Decision.
- c. Upon information and belief, if subject to cross examination by OST and Consolidated Intervenor's counsel, NRC Staff's declarant will repudiate many of the assertion made it NRC Staff's pending motion. Upon information and belief, if confronted with the undisclosed information in NRC Staff's possession, NRC Staff will repudiate many of the assertions made in NRC Staff's pending Motion.

D. Background on NEPA Requirements

The NEPA requirements were resolved by the Board and Commission, and are not properly revisited in a motion for summary disposition. But, since NRC Staff seeks new determinations on settled legal issues as a means to establish compliance with the previous holdings, NEPA will be summarized and addressed again.

NEPA is an action-forcing statute applicable to all federal agencies. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). The statute requires "that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas and Electric Company v. NRDC*, 462 U.S. 87, 97 (1983).

In a NEPA document, the government must disclose and take a “hard look” at the foreseeable environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

Closely related to NEPA’s “hard look” mandate, NEPA prohibits reliance upon conclusions or assumptions that are not supported by scientific or objective data. “Unsubstantiated determinations or claims lacking in specificity can be fatal for an [environmental study] Such documents must not only reflect the agency’s thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide the reviewing court with the necessary factual specificity to conduct its review.” *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993).

NEPA’s implementing regulations require agencies to “insure the professional integrity, including scientific integrity of the discussions and analysis....” 40 C.F.R. § 1502.24 (Methodology and Scientific Accuracy). Further, where data is not presented in the NEPA document, the agency must justify not requiring that data to be obtained. 40 C.F.R. § 1502.22.

The CEQ regulations require that: “NEPA procedures must ensure that environmental information is available to public officials and citizens **before** decisions are made and **before** actions are taken.” 40 C.F.R. § 1500.1(b)(emphasis added). The statutory prohibition against taking agency action before NEPA compliance applies to NRC decisionmaking. 42 U.S.C. § 4332(2)(C) *cited by New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012).

To meet these requirements “an agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment.” *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990), *citing Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986).

A federal agency may not simply claim that it lacks sufficient information to assess the impacts of its actions. Rather, “[a] conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.” *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), *aff’d* 998 F.2d (9th Cir. 1993).

NEPA requires that mitigation measures be reviewed in the NEPA process. “[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989), *accord New York v. NRC*, 681 F.3d 471, 476 (D.C. Cir. 2012).

NEPA regulations require that an EIS: (1) “include appropriate mitigation measures not already included in the proposed action or alternatives,” 40 C.F.R. § 1502.14(f); and (2) “include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f)).” 40 C.F.R. § 1502.16(h).

NEPA requires that all relevant information necessary for an agency to demonstrate compliance with NEPA be included in an environmental impact statement, and not in additional documents outside of the public comment and review procedures applicable to that environmental impact statement. See, *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff’d sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) (“The

adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement.”); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997)(“Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot ‘bring into compliance with NEPA an EIS that by itself is inadequate.’ . . . Because of the importance of NEPA’s procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency’s actual decision was informed and well-reasoned.”); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (same).

E. Background on NHPA Standards

The Motion similarly and impermissibly attempts to revisit and revise the NHPA standards established in the Board and Commission orders.

The federal courts have addressed the strict mandates of the NHPA:

Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c). The [federal agency] must confer with the State Historic Preservation Officer (“SHPO”) and seek the approval of the Advisory Council on Historic Preservation (“Council”).

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). See also 36 C.F.R. § 800.8(c)(1)(v)(agency must “[d]evelop in consultation with identified consulting parties

alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.”).

The Advisory Council on Historic Preservation (“ACHP”) has set forth regulations implementing the NHPA’s requirements. See *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff’d per curiam*, 635 F.2d 324 (4th Cir. 1980). The ACHP’s regulations “govern the implementation of Section 106,” not only for the Council itself, but for all other federal agencies. *Id.*

NHPA § 106 requires federal agencies, prior to approving any undertaking,” such as this project, to “take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register.” 54 U.S.C. § 302909. Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995).

If an undertaking is the type that “may affect” an eligible site, which is uncontested with respect to the Dewey-Burdock project, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties. 36 C.F.R. § 800.4(d)(2). See also *Pueblo of Sandia*, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties).

The NHPA also requires that federal agencies consult with any “Indian tribe ... that attaches religious and cultural significance” to the sites. 54 U.S.C. § 302706(b). Consultation must provide the tribe “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional

religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.” 36 C.F.R. § 800.2(c)(2)(ii).

Apart from requiring that an agency make a reasonable and good faith effort to identify cultural properties, (36 C.F.R. § 800.4(b)) and allow affected tribes a reasonable opportunity to be involved in the identification and evaluation of cultural properties, the NHPA requires that “[t]he agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.” 36 C.F.R. § 800.1(c). The ACHP has published guidance specifically on this point, reiterating that consultation must begin at the earliest possible time in an agency’s consideration of an undertaking, framing such early engagement with the Tribe as an issue of respect for tribal sovereignty. ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (November 2008), at 3, 7, 12, and 29.

Regarding respect for tribal sovereignty, the NHPA requires that consultation with Indian tribes “recognize the government-to-government relationship between the Federal Government and Indian tribes.” 36 C.F.R. § 800.2(c)(2)(ii)(C). See also Presidential Executive Memorandum entitled “Government-to-Government Relations with Native American Tribal Governments” (April 29, 1994), 59 Fed.Reg. 22951, and Presidential Executive Order 13007, “Indian Sacred Sites” (May 24, 1996), 61 Fed.Reg. 26771. The federal courts echo this principle in mandating all federal agencies to fully implement the federal government’s trust responsibility. See Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981) (“any Federal Government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes”).

NRC Staff is not entitled to deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs. In the usual circumstance, “[t]he governing canon

of construction requires that ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’ This departure from the [normal deference to agencies] arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from the ordinary exegesis, but ‘from principles of equitable obligations and normative rules of behavior,’ applicable to the trust relationship between the United States and the Native American people.” *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) quoting *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001)(quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, (1985)). The ACHP regulations allow for the use of Programmatic Agreements (PA) under limited circumstances. Specifically, a PA is allowable only where:

- (i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;
- (ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) When nonfederal parties are delegated major decisionmaking responsibilities;
- (iv) Where routine management activities are undertaken at Federal installations, facilities, or other land management units; or
- (v) Where other circumstances warrant a departure from the normal section 106 process.

36 C.F.R. § 800.14(b)(1).

F. NRC Staff Has Not Demonstrated Compliance with the NHPA

The duty to demonstrate NHPA compliance falls on the NRC Staff. 36 C.F.R. § 800.2(a)(3). As discussed herein, NRC Staff has failed to proffer any post-hearing evidence supporting NHPA compliance, and thus the Board should find that the NHPA violations have not been remedied, should make its findings of NHPA violations final, and order the decision to issue the license invalid for failure to comply with the NHPA. Even if NRC Staff were correct in

its characterization of the events that lead to the NRC Staff's unilateral termination of efforts to identify a mutually-agreeable survey methodology, the NHPA duty remains unsatisfied.

Overall, NRC Staff presents a narrative that attempts to paint the Tribe as unresponsive and solely to blame for the lack of a mutually-agreeable means by which NRC Staff would remedy its failure to comply with NHPA. However, this characterization ignores NRC Staff's own lack of responsiveness and refusal to engage in meaningful discussion of a potential cultural resources survey method. Notably, the current impasse is based on precisely the same NRC Staff inflexibility that previously resulted in NRC Staff's refusal to take reasonable steps to identify and analyze impacts to cultural resources.

Contrary to NRC Staff's approach, other agencies routinely rely on qualified agency staff to devise means to satisfy NHPA duties that do not attempt shift the agency duty and burden onto the Tribe. See e.g. Ctr. for Biological Diversity v. United States BLM, 2017 U.S. Dist. LEXIS 137089, at *54-55 (D. Nev. Aug. 23, 2017)(holding the agency "engaged in a good-faith attempt to identify relevant cultural sites and consult with the tribes about how best to protect them.").

In that case, the Court upheld the Bureau of Land Management's efforts under the NHPA to identify cultural resources and consult with the Tribe based on that fact that the agency staff created a "137-page cultural resources inventory and a 147-page ethnographic assessment for this project. The authors of the ethnographic assessment relied on interviews with tribe members and site visits in 2008 and 2009 attended by the Goshute Tribe's representatives, as well as prior studies and scholarly references. The ethnographers prepared a report, successive drafts of which were circulated among identified Indian tribes." *Id.* The agency analysis and cooperation with the Goshute Tribe in *Ctr. for Biological Diversity* demonstrate the fallacy that NRC Staff was

somehow powerless to fulfill its NHPA responsibilities regarding an analysis of cultural resource impacts and consultation. It is no defense that NRC does not employ ethnographers or other qualified staff. It is no defense that Powertech refuses to pay for NRC Staff to hire such persons or otherwise engage a qualified consultant.

Instead, NRC Staff presents an incomplete set of emails, peppered with self-serving recounts of calls and phone messages. The upshot is that NRC Staff has spent its time creating a disputed narrative that blames OST Staff for the NRC Staff's failure to make any substantive proposal or take meaningful action to meet NRC duties to comply with NHPA, NEPA, and the government to government consultation. Beginning with the NRC Staff's inaction in the months following the April 2015 Board Decision and compounded by NRC Staff's decision to dedicate resources to other cases, and NRC Staff's failure to communicate through OST Counsel, as instructed, NRC Staff and NRC Staff's Counsel have carefully constructed a series of failed communications that underlie, and undermine, the present Motion.

The Tribe's factual statement in Section B, for which the standard of review on a Motion for Summary Disposition mandates the Board give precedence, demonstrates that NRC Staff has not engaged in a good faith and meaningful consultation with the Tribe.

The Board and Commission ruled that NRC Staff failed to meet its duties with regard to cultural resources. *Powertech USA, Inc.* (Dewey Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618, 657 (2015). Instead of recognizing the adverse ruling, NRC Staff's Motion asserts that this Board found compliance with the NHPA with regard to a good faith reasonable effort to identify properties eligible for inclusion in the National Register of Historic Places. Motion at 4. By avoiding the relevant and adverse portion of the ruling, NRC Staff has

provided nothing on which the Board can now find compliance with NEPA and the NHPA with respect to the cultural resources. *Powertech USA, Inc.* 81 NRC at 657 (2015).

NRC Staff wrongly asserts, with no support in evidence, that adequate cultural resources information can only be obtained by the Tribe itself. Motion at 4, *citing* 81 NRC at 654-655. However, this overstatement ignores other agencies' use of qualified agency staff that include Tribes in methodologically sound ethnographies, surveys, and other means. *See e.g. Ctr. for Biological Diversity v. United States BLM*, 2017 U.S. Dist. LEXIS 137089, at *54-55 (D. Nev. Aug. 23, 2017). Indeed, a methodologically sound survey lead by qualified NRC Staff and/or agency contractors is what the OST proposed, but NRC Staff rejected out of hand. See May 31, 2017 OST letter (ML17152A109).

NRC Staff asserts that the consultation on the proper methodology for a cultural resources survey has been going on for two years (Motion at 27). However, the facts and the record demonstrates that there was very little, if any, substantive discussion or consultation for the first seventeen months of that time period. ML16287A631. Further, NRC Staff's repeatedly appears to complain that the Tribe took too long to respond to NRC Staff requests for letters or information, but does not attempt to explain why the NRC Staff's missives omitted any substantive response to the Tribes concerns, which formed the basis for the Board's Decision. NRC Staff conveniently ignores the more than six months of time that passed between the May 2016 meeting and NRC Staff's late-November 2016 letter purporting to respond to the Tribe's requests in May 2016. There is no mention of NRC Staff's on-the-record admission to this Board that NRC Staff voluntarily allocated its resources to other cases to the detriment of its work with the Tribe here.

Similarly, the timeline shows that that the Tribe was responsive to NRC Staff, and when it could not be immediately responsive, the Tribe communicated that fact and the basis for the delay – such as in March and April of 2017 when the Tribal Historic Preservation Office underwent a temporary loss of staff. NRC Staff complains about unanswered phone calls, where no voice messages were left, and unreturned emails – but ignore the fact that as early as December 2015, the Tribe’s Counsel informed NRC Staff and counsel that all communications should be copied to the Tribe’s Counsel to help facilitate a response. Every time the straightforward instruction to contact counsel for the represented party in adjudication was followed, a timely response was forthcoming.

Further, it appears that NRC Staff cannot claim good faith government-to-government consultation. When the Tribe anticipated that the substantive discussions would finally occur in April and May of 2017, instead of negotiating directly with the Tribe, the record now shows that NRC Staff and counsel were conducting behind the scenes strategy coordination with Powertech – even to the extent of working to weaken the already rejected open site proposal. In short, NRC Staff focused its resources on driving the negotiations into an unworkable position, perhaps with an eye toward litigating the matter instead of reasonably negotiating with the Tribe. The record before the Board on this motion does not identify a single hour of NRC Staff time committed to identifying and disclosing and mitigating impacts to cultural resources. The standard of review requires the Board to accept the fact that NRC Staff committed no substantive resources to the central task the Board set out in its order, and instead sought to position itself to litigate its position to the Commission and Court of Appeals litigation.

This Board should ignore all of the immaterial noise created by NRC Staff in pointing to its own incomplete timeline that blames the Tribe for NRC Staff’s failure to comply with its

NHPA and NEPA duties. The Tribe's good faith efforts are confirmed by the April 14, 2017 letter from NRC Staff to the Tribe, the May 31, 2017 letter from the Tribe to NRC Staff setting forth detailed points for further discussion, and the NRC Staff's July 24, 2017 curt response. Those letters are virtually the only substantive interaction between the parties as to the parameters of a cultural resources survey. Again, the burden is on NRC Staff, not the Tribe.

The record reflects that the April 14, 2017 was sent by NRC Staff, who appeared to be working as a proxy for Powertech's proposed open-site approach, which differed in no material respect (except possibly weaker) than the previous plans rejected repeatedly over several years by all of the Sioux tribes. In contrast, the Tribe's May 31, 2017 letter contains highly substantive discussion and communicates in good faith to NRC Staff the reasonable aspects over which the Tribe would like to have discussions, without taking any bright line demands. The NRC Staff response seven weeks later on July 24, 2017 is the antithesis of the Tribe's approach. NRC Staff gives a paltry and unexplained one-sentence rationale for unilaterally abandoning all consultation without even the benefit of another conversation.

NRC Staff concedes that the NHPA requires consultation "should be carried out 'in a manner sensitive to the concerns and needs of the Indian tribe.'" Motion at 13 citing 36 C.F.R. § 800.2(c)(2)(ii)(C). However, the only response to the Tribe after detailing its concerns and desires for detailed discussion was for NRC Staff to unilaterally abandon the process with no coherent explanation or reasoning and proceed immediately to filing for summary disposition. Indeed, the only detectable reason stated in the letter sent to the Tribe was NRC Staff's new-found objection to involving any other Sioux tribes in the process, asserting that somehow this was a new development. To the contrary, the Tribe had expressed this point of involving other tribes from the earliest discussions. At every turn, NRC Staff diligently cataloged its grievances.

At no time did NRC Staff engage a good-faith attempt to deploy qualified staff or obtain resources necessary to create and implement methodologically sound cultural resources survey that serves as a condition precedent for NHPA and/or NEPA compliance.

While certainly the NHPA requires meaningful and good faith consultation with the Tribe, and National Register Bulletin 38 confirms that the Tribe's certainly ought to be involved, that document stops short of dictating that a Tribe must be the entity to undertake a competent survey in all circumstances. See Motion at 11-12 n 71.

As such, the record and facts, especially when interpreted in the light most favorable to the Tribe, demonstrates that NRC Staff has not met its burden for summary disposition on the NHPA issue.

G. NRC Staff's Motion Has Not Demonstrated Compliance with NEPA

The Commission's majority ruled that the Board correctly concluded that NEPA imposes obligations on NRC that NRC Staff's FSEIS failed to satisfy. *In re Powertech (USA), Inc.*, 2016 NRC LEXIS 36 at *63 (N.R.C. Dec. 23, 2016)(upholding Board finding that "analysis of the environmental effects on cultural resources in the FSEIS was insufficient"). While "it is true that "the ultimate burden with respect to NEPA lies with the NRC Staff," NRC Staff has not presented any further NEPA analysis or documentation that could meet its NEPA obligations. *Id.* at 24. Read fairly, the Motion simply urges the Board to adopt Commissioner Svinicki's dissenting view that adopted NRC Staff's narrow view of NEPA requirements. *Id.* at 96. However, this Board lacks jurisdiction to revisit the Commission's legal determinations, and may only address the "narrow issue of resolving the deficiencies identified by the Board." *Id.* at 50.

The NEPA issue is therefore limited to whether NRC Staff conducted a NEPA analysis or public participation opportunity to cure the "deficiencies in the FSEIS" that lacks the necessary

“hard look” identification, analysis, and disclosure of impacts to cultural resources. *Id.* at 54. The NEPA issue is easily resolved because NRC Staff has not identified any NEPA analysis, NEPA process, or NEPA document addressing impacts to cultural resources that could cure the FSEIS deficiencies. *Id.* at 38 (“NEPA requires an analysis of the effects on all of the cultural resources present at the site, not only those properties eligible for listing on the National Register of Historic Places.”). NRC Staff’s legal arguments that attempt to avoid the NEPA requirements set out by the Board and Commission similarly fall short.

1. NRC Staff has Prepared no NEPA Document or NEPA Analysis Since the FSEIS

The Board confirmed that NRC Staff must support its NEPA compliance, if at all, “by a preponderance of the evidence.” *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 642 (N.R.C. Apr. 30, 2015). NRC Staff ignores its burden and provides no evidence of any NEPA analysis or NEPA documentation, arguing instead that unsuccessful attempts to create a survey methodology through NHPA consultation excuses NEPA compliance.

As the Board held, “[w]ithout additional analysis as to how the Powertech project may affect the Sioux Tribes’ cultural, historical, and religious connections with the area, NEPA’s hard look requirement has not been satisfied, and potentially necessary mitigation measures have not been established.” *Id.* at 655. The Board need go no further than to hold that NRC Staff has provided no evidence of any NEPA analysis that could cure the FSEIS deficiencies.

2. Consultation is not the Only Means to Satisfy NRC’s NEPA Duties

The Commission did not limit NRC Staff’s use of various means to satisfy NEPA’s “hard look” mandate and confirmed that NRC “Staff is free to select whatever course of action it deems appropriate to address the deficiencies identified in the Board’s order, including, but not limited to further government-to-government consultation.” *In re Powertech (USA), Inc.*, 2016

NRC LEXIS 36 at *70 (N.R.C. Dec. 23, 2016) (emphasis supplied). Despite the explicit command that consultation is one among many means to satisfy NEPA, the only course of action NRC Staff took was an unsuccessful and truncated government-to-government consultation limited to conceptual discussion of a proper methodology for cultural resource surveys.

NEPA compliance cannot have been achieved based on the undisputed fact that NRC Staff has conducted no additional efforts to identify cultural resources – no research, no interviews, no ethnographic analysis, no circulation of draft analyses, no additional field investigation, and no other professional tools. NRC Staff asserts that “the fundamental difference between properties of traditional religious or historical significance to a Tribe, and other kinds of historic properties, is that their significance cannot be determined solely by research, archaeological field investigation, and other professional tools; instead, the existence and significance of such sites must be determined by the community that values it.” Motion at 12. However, this fundamentally misunderstands that the Commission confirmed the agency’s duties under NEPA fall on NRC Staff, not the Tribe, Tribal members, or the general public. *In re Powertech (USA), Inc.*, 2016 NRC LEXIS 36 at *24 (N.R.C. Dec. 23, 2016) (emphasis supplied) (“the ultimate burden with respect to NEPA lies with the NRC Staff,”). While certainly involvement of the Tribe is an important and highly valuable component – regardless of the participation by the Tribe, the NRC Staff has an independent duty to conduct NRC’s cultural resources impacts analysis in accordance with NEPA’s “hard look” mandate.

NEPA makes clear that impacts of the license applicant’s proposal on cultural resources are one of many categories of effects an agency must analyze, disclose, and compare in “a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences” in agency decisionmaking. 42 U.S.C. § 4332(2)(A). The regulations define

direct and indirect impacts to include “effects on natural resources and on the components, structures, and functioning of affected ecosystems,” as well as “aesthetic, historic, cultural, economic, social or health [effects].” 40 C.F.R. § 1508.8(b). See also 40 C.F.R. § 1502.16(g) (NEPA analysis “shall include discussions of ... historic and cultural resources....”).

Thus, even where a tribal government is not involved – or is unreasonably excluded from an analysis as the Tribe has demonstrated occurred in this case – the Commission recognized that NRC Staff may use other means to provide a NEPA-compliant analysis of impacts to cultural impacts. *In re Powertech (USA), Inc.*, 2016 NRC LEXIS 36 at *70 (N.R.C. Dec. 23, 2016) (emphasis supplied) (identifying consultation as one means, among others, to address FEIS deficiencies). The fact that NRC Staff lacks the requisite expertise in the relevant disciplines necessary to carry out NRC’s NEPA cultural resources duties does not excuse compliance with federal law. Otherwise, the untenable result, and precedent, would be that NRC Staff need only fail to reach agreement with a tribal government to effectively evade conducting its statutorily-mandated cultural resources impact analysis. NRC Staff offers no authority for such a proposition.

The Tribe, like the Board and Commission, would prefer to reach an agreement with NRC Staff on the design and implementation of cultural resources survey. The Tribe remained willing throughout to meaningfully participate in the type of methodologically-sound survey and NEPA analysis that NRC Staff has rejected without articulating its basis. The Tribe prepared to urge its members and the general public to submit their comments on a draft NEPA document that identified (consistent with federal law) and analyzed impacts to cultural resources at the site. As the Board found, “Tribal officials stated that historic and cultural resource studies of the sites should be conducted with tribal *involvement*.” *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 645

(N.R.C. Apr. 30, 2015) (emphasis supplied). Although the Tribe set forth detailed suggestions to further the discussion of methodology to counter NRC's reliance on Powertech's proposal that lay persons to do informal field surveys, (*id.* at 644-649), at no time has the Tribe offered to assume NRC Staff's duty to conduct the necessary NEPA analysis.

Other cases and governmental documents demonstrate that NEPA duties to identify, analyze, and disclose impacts to cultural resources impose a broader mandate that cannot be avoided, even assuming *arguendo* that NRC Staff's calls and emails satisfied NHPA's consultation duties. For example, even if an agreement with NRC Staff remains elusive, other non-Indian agencies, such as the South Dakota SHPO and even the North Dakota Department of Transportation, regularly conduct such research, including putting out Requests for Proposals for cultural resources surveys from professional cultural resource contractors. See http://history.sd.gov/Preservation/RFP_ShannonCoSurvey.pdf; <https://duckduckgo.com/l/?kh=-1&uddg=https%3A%2F%2Fwww.dot.nd.gov%2Fdivisions%2Fets%2FRFPs%2Fdocs%2F56%2FRFP%2520Complete%2520Cultural%2520Resource%25202016-2017%2520State%2520Work.docx>. Further, Commission precedent confirms that the NRC Staff (and the applicant) can meet this duty by hiring independent, qualified cultural resources consultants to coordinate and/or conduct the required survey in order to sufficiently inform the NEPA analysis with credible information. Such was the case in *In the Matter of Hydro Resources, Inc.* (2929 Coors Road Suite 101 Albuquerque, New Mexico 87120), 62 N.R.C. 442 (2005), where the required NEPA cultural resources impact analysis was upheld based specifically on the cultural resources studies and analyses prepared by the applicant's consultants. 62 N.R.C. at 451-452. Importantly, the consultant must appropriately coordinate and interact with the relevant tribal governments and communities. *Id.*

Similarly, other agencies routinely rely on qualified agency social scientists such as trained ethnographers to carry out the necessary surveys and analysis, with significant input, participation, and consultation from the relevant tribes, without any mandate that a certain tribe conduct the survey. See e.g. *Ctr. for Biological Diversity v. United States BLM*, 2017 U.S. Dist. LEXIS 137089, at *54-55 (D. Nev. Aug. 23, 2017)(holding that BLM “engaged in a good-faith attempt to identify relevant cultural sites and consult with the tribes about how best to protect them” including preparation of significant cultural and ethnographic reports and studies).

Contrary to the examples cited above, NRC Staff in this case failed to procure the necessary expertise (directly from the Oglala Sioux Tribe through consultation or otherwise) to fulfill its NEPA cultural resource impact review obligations and instead simply abandoned the cultural survey efforts and filed the instant Motion without explaining the reasons for doing so or giving the Tribe an meaningful opportunity to respond to its decision. Indeed, the Motion does not address or identify a single attempt by NRC Staff to address the merits of the Commission’s order finding a lack of NEPA compliance.

During the November 2016 conference call with the Board, NRC Staff admitted that its efforts to hire contractors for this and the similarly-situated Crow Butte case were stymied by the lack of resources from the applicant committed to address the NEPA deficiencies. See Transcript of November 16, 2016 conference call (ML16314A843) at 24-29. As demonstrated by the Transcript, the problem appears to be an unwillingness on the part of the applicant to pay for the necessary studies. However, if Powertech lacks (or refuses to expend) the resources to meet NRC’s licensing obligations, that should end the matter and the license should be revoked. Put simply, NEPA does not contain an exemption for Powertech’s financial inability to pay for a methodologically-sound survey. It should not go without notice that the Motion does not identify

a single hour of NRC Staff time, or any billing sent to Powertech, that involved NRC Staff consultation with persons qualified to create, coordinate, and carry out the actions necessary to meet NRC's duties.

The Commission's recognition of other means to satisfy this duty, in combination with examples of other means that NRC and federal courts have condoned on the circumstances of those cases, confirm the fallacy of NRC Staff's argument that it may forsake its cultural resources impact analysis obligations under NEPA when government-to-government consultation does not result in a viable and scientifically sound cultural resource survey methodology.

3. The "Rule of Reason" Does Not Excuse NRC Staff from its NEPA Duties

NRC Staff justifies its failure to prepare any further NEPA analysis on cultural resources by relying on NEPA caselaw from the Ninth Circuit that applies a "rule of reason" to NEPA analyses. Motion at 34. However, NRC Staff misapply this caselaw. The cases cited by NRC Staff do not stand for the proposition that an agency may neglect to analyze a foreseeable impact from its actions, such as impacts to cultural resources at issue here. Rather, the "rule of reason" discussed in the cases cited by NRC Staff relate to the fact that an agency is not obligated to analyze wholly speculative or remote consequences from agency actions.

Here, in holding the FSEIS inadequate to meet NEPA's "hard look" mandate, the Commission confirmed that the "Board found insufficient the Staff's analysis of the environmental effects of the Dewey-Burdock project on Native American cultural, historic, and religious resources." *In re Powertech (USA), Inc.*, 2016 NRC LEXIS 36 at *53 (N.R.C. Dec. 23, 2016) (emphasis supplied). There has never been a dispute that the Powertech proposal will have certain impacts on "Native American cultural, historic, and religious resources." *Id.* The

only dispute is whether NRC Staff carried out a NEPA analysis of these impacts sufficient to support license approval. It has not. Simply put, the consequences of the NRC license are not remote or speculative, and the “rule of reason” does not excuse NRC’s failure to prepare any NEPA analysis to address the deficient FSEIS.

For instance, in *Ground Zero Ctr. For Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082 (9th Cir. 2004), the primary case relied upon by NRC Staff, the Court rejected a claim that the Navy, in siting a nuclear weapons facility, must conduct a detailed NEPA analysis of the potential for an accidental nuclear explosion. The evidence in *Ground Zero* case showed that the chances of a significant impact from such an event was one in 100 million and one in one trillion. *Id.* at 1090. As held by the Court, “[t]he risk of accidental explosion is estimated by multiplying the risk of any accident by the risk that an accident will yield explosion. The product of the probabilities cited in the Navy’s report is infinitesimal, and such remote possibilities do not in law require environmental evaluation.” *Id.*

This factual situation is a far cry from that presented here. Here, there is no dispute that “the proposed action has the potential to affect certain sites of religious and cultural significance to Native American tribes.” *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 644 (N.R.C. Apr. 30, 2015).

In addition to the factual disparities, the legal analysis by the Court in *Ground Zero Ctr. For Non-Violent Action* demonstrates the case is limited to situations where “[a]n EIS need not discuss remote and highly speculative consequences.” 383 F.3d. at 1283; see also *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir.1980).” See also, *id.* at n.6 (“For example, we have held that agencies performing NEPA review are not required to consider the environmental consequences of the increased risk of nuclear war resulting from construction of

military communications towers, *No GWEN*, 855 F.2d at 1381, 1386, the environmental effects from the failure of a dam from a catastrophic, but highly unlikely, earthquake, *Warm Springs*, 621 F.2d at 1026-27, or how remotely possible land-use changes might bear on the environmental effects of a new dam, *Trout Unlimited*, 509 F.2d at 1283-84.”).

NRC Staff also relies upon *Kern v. BLM*, 284 F.3d 1062 (9th Cir. 2002) to defend the absence of any analysis of Sioux cultural resources in the FSEIS. Motion at 34. NRC Staff asserts that *Kern* “acknowledges that in certain cases an agency may be unable to obtain information to support a complete analysis.” Motion at 34. Apart from the admission contained in this argument that the FSEIS lacks a complete analysis, NRC Staff fails to recognize that in *Kern*, the Court found the agency’s analysis in violation of NEPA precisely because it lacked the necessary complete analysis. As the Court explained:

An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an [action] merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program

Kern, 284 F.3d at 1072 (citations and internal quotations omitted). As such, *Kern* does not support NRC Staff’s position – and directly contradicts any reliance by NRC Staff on the Programmatic Agreement (PA) to provide the basis to analyze the impacts of the proposed mine on Sioux cultural resources at some later time in the future. See Motion at 32-33 (implying that federal laws are satisfied because the PA contains statements about future analysis and consultation over impacts to cultural resources).

The *Kern* case specifically disallows an agency from ignoring the impacts of its actions when those impacts are contemplated: “[T]he purpose of an [EIS] is to evaluate the possibilities in light of current *and contemplated* plans and to produce an informed estimate of the environmental consequences.... Drafting an[EIS] necessarily involves some degree of

forecasting.” *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir.1975) (emphasis added).”
284 F.3d at 1072.

NRC Staff also cites to, and relies heavily upon, U.S. NRC precedent which NRC Staff asserts justify its failure to review the impacts to Sioux cultural resources. See Motion at 34 (citing *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002); and *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 297, 315 (2010)). However, as with the federal case law relied upon by NRC Staff, these cases are similarly inapposite to the situation presented here.

In *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002), the Commission ruled that a NRC Staff NEPA analysis need not consider the highly remote potential for a terrorism attack on a nuclear fuel facility. In so ruling, the Commission held:

It is well established that NEPA requires only a discussion of “reasonably foreseeable” impacts. Grappling with this concept, various courts have described it as a “rule of reason,” or “rule of reasonableness,” which excludes “remote and speculative” impacts or “worst-case” scenarios. Courts have excluded impacts with either a low probability of occurrence, or where the link between the agency action and the claimed impact is too attenuated to find the proposed federal action to be the “proximate cause” of that impact. NEPA does not call for “examination of every conceivable aspect of federally licensed projects.” Here, the possibility of a terrorist attack on the PFS facility is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.

Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002)(footnotes and citations omitted).

Thus, NRC Staff confuses the application of NEPA’s “rule of reason” as to unlawfully evade analysis of reasonably foreseeable impacts that must be considered in a NEPA document. The cited “rule” does not allow NRC Staff to abandon its NEPA analysis of impacts, such as

those to cultural resources at issue here, that are an expected, foreseeable, and natural consequence of its actions. NRC Staff has not, and cannot, make the necessary showing that impacts to cultural resources are somehow highly remote or speculative. Here, the Board's order confirmed that impacts are non-speculative by emphasizing the fact that the FSEIS's lacked analysis of "potentially necessary mitigation measures" for "environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources." *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 655 (N.R.C. Apr. 30, 2015).

Similarly, in *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 297 (2010), relied upon by NRC Staff, the Commission dealt with a situation entirely distinct from that presented here. In that case, the intervenor argued that NRC Staff had used improper models and inputs to an existing analysis in the NEPA document of Severe Accident Mitigation Alternatives (SAMA) such that the analysis resulted in erroneous conclusions. The Board clarified that "the issue here is whether the Pilgrim SAMA analysis resulted in erroneous conclusions on the SAMAs found cost-beneficial to implement. The question is not whether there are "plainly better" atmospheric dispersion models or whether the SAMA analysis can be refined further." 71 NRC at 315. Based on the Commission's finding that NRC Staff did conduct a detailed SAMA analysis, the Commission recited some general legal points, in dicta, without applying or analyzing those legal points with respect to any particular aspect of the case:

NEPA "should be construed in the light of reason if it is not to demand" virtually infinite study and resources. Nor is an environmental impact statement intended to be a "research document," reflecting the frontiers of scientific methodology, studies and data. NEPA does not require agencies to use technologies and methodologies that are still "emerging" and under development, or to study phenomena "for which there are not yet standard methods of measurement or analysis." And while there "will always be more data that could be gathered," agencies "must have some discretion to draw the line and move

forward with decisionmaking.” In short, NEPA allows agencies “to select their own methodology as long as that methodology is reasonable.”

71 NRC at 315 (footnotes and citations omitted). This is the passage cited by NRC Staff in the case at bar in support of its Motion. However, fatal to NRC Staff’s argument, nowhere has NRC Staff provided any evidence that the Tribe is requesting that NRC Staff must use “emerging” technologies or conduct analysis that reflects “the frontiers of scientific methodology, studies and data.”

Additionally, and importantly, the Commission in *Pilgrim* went on to distinguish the SAMA analysis at issue there as a mitigation analysis, and “not a substitute for, and do[es] not represent, the NRC NEPA analysis of potential impacts” from the licensing activity. 71 NRC at 316. The Commission pointed this out as important because under applicable NEPA law, unlike site-specific impact analyses, site-specific mitigation analyses do not require a fully-developed mitigation plan, but rather one that is reasonably complete. *Id.* Thus, the *Pilgrim* case is distinct on the facts and the law from the case at issue here, and does not support NRC Staff’s proposal to dispense with the cultural resources impact review altogether.

Here, the impacts are well known and/or knowable, and NRC Staff has not provided any evidence that it conducted a NEPA-compliant impacts analysis and has conducted no NEPA mitigation analysis. *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 644 (N.R.C. Apr. 30, 2015). In fact, NRC Staff has provided no evidence that it conducted any NEPA analysis after the Board’s April 2015 Order established the FSEIS lacked the “hard look” required by NEPA. *Id.*

4. NRC Staff Seeks to Blame the Tribe for the Lack of NEPA’s Hard Look

As the Board stated, NEPA’s “hard look is intended to foster both informed agency decision-making and informed public participation so as to ensure that the agency does not act upon incomplete information.” *Id.* at 637. “The NEPA hard look must emerge from an

engagement in informed and reasoned decision making, as the agency ‘obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised.’” *Id.* at n. 98 *quoting Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (*citing Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378–85 (1989)). NRC Staff does not identify a scintilla of cultural resource information or analysis, and continues to blame the Tribe for the unresolved deficiencies in the FSEIS.

NRC Staff cites (in a footnote), but does not analyze, 40 C.F.R. § 1502.22, as a defense for its failure to provide any evidence that NRC Staff with relevant expertise conducted any hard look review of Sioux cultural resources in any NEPA document. Motion at 34, n. 202. Given this lack of analysis or otherwise coherent argument, this Board should not deem this mere citation as a legitimate basis upon which the Motion can be granted. In any case, while this regulation does deal with situations where there is incomplete or unavailable information, it applies only where the agency makes a conclusive showing that the “overall costs of obtaining it are exorbitant or the means to obtain it are not known...” 40 C.F.R. § 1502.22(b). Nowhere in the Statement of Facts or in the one affidavit filed in support of the Motion does NRC Staff present any such evidence, let alone such evidence to overcome its burden to make the required showing. Indeed, NRC Staff provided no evidence that qualified experts considered the Tribe’s proposals, let alone created a cost estimate based on the Tribe’s proposed methodologies.

NRC Staff erroneously asserts that NEPA’s “hard look” standard is satisfied regardless of whether the agency gathered the available and necessary information and actual conducts any of the relevant analysis, so long as “Staff made reasonable efforts to do so.” Motion at 34. This is wrong. As the Board’s Opinion rightly stated, NEPA imposes on NRC Staff “the duty of

complying with the [environmental] impact statement requirement ‘to the fullest extent possible.’” *In re Powertech USA, Inc.*, 81 N.R.C. 618 at 655-657 (N.R.C. Apr. 30, 2015) *quoting Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) (*quoting* 42 U.S.C. § 4332). As postured, the Board does not have the authority to adopt the standard advocated by NRC Staff. NRC Staff does not allege, let alone show evidence, that it attempted to meet the “fullest extent possible” standard confirmed by the Board. Instead, NRC Staff continues to rely on the FSIES that NRC Staff prepared in reliance on the “reasonable efforts” theory.

Tellingly, the only federal case law citations NRC Staff is able to muster for this “reasonable efforts” proposition are the *Ground Zero Ctr. For Non-Violent Action* and *Warm Springs* cases discussed *supra*. Similarly, the only Commission precedent cited for a “reasonable efforts” standard is the *Pilgrim* case. As established, these cases dealt with situations where Courts applied the “rule of reason” with respect to only highly remote or highly speculative impacts. See, *Warm Springs* (the environmental effects from the failure of a dam from a catastrophic, but highly unlikely, earthquake); *Ground Zero Ctr. For Non-Violent Action* (analysis of the *one in 100 million and one in one trillion* potential for an accidental nuclear explosion); *Pilgrim* (dealing with mitigation measures and attempts to force the use of “emerging” technologies and analyses that reflects “the frontiers of scientific methodology, studies and data.”).

NRC Staff argues that it failed to obtain information on Sioux cultural resources because the Tribe failed to provide it and has not “availed itself” of the offered opportunities to survey the Dewey-Burdock project site for such properties. Motion at 35. NRC Staff’s attempt to shift NRC duties onto the Tribe should be forcefully rejected by the Board. Federal case law is replete with cases that drive home the fact that the public (including tribes) are not responsible

for providing an agency with the required NEPA analysis. For instance, the Ninth Circuit has repeatedly held that it is the agency's duty under NEPA, not the public's, to provide the needed information and analysis for public review and comment.

To hold otherwise would require the public, rather than the agency, to ascertain the ... effects of a proposed action. Such a requirement would thwart one of the "twin aims" of NEPA—to "ensure[] that the *agency* will inform the *public* that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) (emphasis added).

Te-Moak Tribe v. Dept. of Interior, 608 F.3d 592, 605 (9th Cir. 2010) (citation omitted).

"Compliance with [the National Environmental Policy Act] is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *City of Carmel-By-The-Sea v. U.S. Dept. Trans.*, 123 F.3d 1142, 1161 (9th Cir. 1997).

NRC Staff overstates its position that the Tribe's formal participation is an absolute necessity for NRC Staff to gather any information on Sioux cultural resources and properties. Motion at 35. Obviously, the Tribe desires to be intimately involved in the survey process and has worked for years trying to convince NRC Staff to conduct the necessary surveys through meaningful consultation and in a manner that will yield the information required to conduct a competent hard look analysis.

5. National Register Bulletin 38 is Consistent with NRC Staff's NEPA Duties

As discussed with regard to the NHPA issues, NRC Staff has never put forth a reasonable offer to negotiate the methods of a survey, but has repeatedly attempted to force the two-week "open-site" approach that has been repeatedly rejected for years by every singly Sioux tribe that has considered such an approach. The reasons for these rejections have been detailed to NRC Staff multiple times, most recently in the May 31, 2017 letter from the Tribe to NRC Staff.

ML17152A109. NRC Staff has provided no evidence to suggest the “open site” approach meets NEPA’s “fullest extent possible” standard, relying instead on bare assertions of the inapplicable “reasonable efforts.” Similarly, NRC Staff compounds its failure to provide the Tribe a reason or basis to reject the discussion points proposed by the May 31, 2017 letter by similarly refusing to provide this Board with any evidence to refute the interdisciplinary methodology set out in the Tribe’s proposal – an approach endorsed NRC Staff’s own experts. ML17152A109 at 3-4.

NRC Staff relies on National Register Bulletin 38 to defend its refusal to conduct a NEPA-complaint cultural resources analysis. Motion at 35. In this regard, it is important to point out again, in this context, that the Tribe has continually expressed its willingness and desire to continue to engage in discussions to craft a culturally-meaningful survey methodology that satisfies NEPA. It was NRC Staff that unilaterally cut off all negotiations with the Tribe – without explaining the basis for NRC Staff’s perceived impasse. NRC Staff should not now be heard to blame the Tribe for rejecting NRC Staff’s offer of the same limited two-week open-site survey method that has been repeatedly rejected for years by every Sioux tribe that has considered it.

Regardless, Bulletin 38 does not mandate any tribe’s formal involvement in a NEPA-compliant survey, although tribes’ direct participation obviously benefits the analysis. National Register Bulletin 38 does require that NRC Staff engage and:

consult with groups and individuals who have special knowledge about and interests in the history and culture of the area to be studied. In the case of traditional cultural properties, this means those individuals and groups who may ascribe traditional cultural significance to locations within the study area, and those who may have knowledge of such individuals and groups.

National Register Bulletin 38 at 7. This is the approach taken by the applicant in the *Hydro Resources, Inc.* case, where a professional consultant with the requisite experience and knowledge was hired to coordinate and conduct the site survey.

Tellingly, NRC Staff fails to cite to any specific provisions of National Register Bulletin 38 that supports its narrow view. Instead, NRC Staff cites collectively to whole sections of the document (see Motion at 34 n. 207 (citing generally to pages 7-10)) or even the entire 32-page document (see Motion at 19 n. 123). Similarly, NRC Staff cherry-picks one sentence from a letter from former Oglala Sioux Tribe President John Yellow Bird Steele. Motion at 19 n. 123. However, that quote from the former President states the unremarkable truism, also reflected in National Register Bulletin 38 and embodied in NEPA (and competent science, for that matter), that cultural resources surveys of Sioux cultural sites should not be conducted by someone without any expertise in Sioux cultural sites. Motion at 19 n. 123. Overall, nothing NRC Staff puts forward excuses its lack of a NEPA-compliant cultural resources impact analysis.

Lastly, NRC Staff asserts that the existing FEIS contains an adequate analysis of Sioux cultural resources, despite the lack of any supplemental analysis since this Board's Order finding that same analysis inadequate. Indeed, NRC Staff itself, in response to the Tribe's contentions on the Draft SEIS, conceded that its analysis was incomplete, promising to supplement the analysis. As stated in the NRC Staff Answer to Contentions on the Draft Supplemental Environmental Impact Statement with respect to the cultural resources survey issue:

As the Staff explained when it issued the DSEIS, however, it is working to facilitate a field survey of the Dewey-Burdock site in order to obtain additional information on historic properties. When the survey is complete, the Staff will supplement its analysis in the DSEIS and circulate the new analysis for public comment.

NRC Staff's Answer to Contentions on Draft Supplemental Environmental Impact Statement at 13 (ML13066B030). However, the promised field survey and information were not provided in

the FSEIS or any other NEPA environmental document. Likewise, the Final SEIS proceeded without any supplemental analysis despite NRC Staff's admission that the document failed to adequately analyze Sioux cultural resources, and the promise to issue a supplemental NEPA document in the future – which even to date NRC Staff has never done. Now, the NRC Staff seeks to avoid the Board and Commission Orders without carrying out any new survey, new analysis, or public comment.

In any case, the lack of compliance with NEPA in the FSEIS was established by this Board in its merits ruling, as upheld by the Commission. NRC Staff cannot now be heard to re-argue NEPA compliance based on the same rejected arguments, particularly absent any additional analysis.

H. Remedy

The unique procedural stance of the present case does not allow for a clean application of NRC's adjudicatory rules. However, NRC has interpreted the rules as providing the Board with power to set aside the license. NRC Merits Br. at 8 (ML17227A161) (“the ongoing adjudication could potentially result in modification or revocation of the already-issued license.”) *citing In Re Powertech*, LBP-15-16, 81 N.R.C. 618 at 638 n.104, 679. This Board's power to revoke the license finds further support by the citations referenced in NRC's brief. See e.g. *In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2)* ALAB-416, 5 N.R.C. 1438 (N.R.C. June 29, 1977) (in light of procedural uncertainty, the Board assumed it retained power to lift license suspension the Board had issued). As stated in NRC's unsuccessful motion to dismiss briefing, “ongoing efforts at the NRC could potentially prompt modification or revocation of the license [g]iven that the NRC has already found noncompliance with NEPA and has yet to fix the noncompliance.” NRC Motion to Dismiss Reply Br. at 11.

It is now apparent that the convictions and beliefs that “the NRC Staff will act with dispatch to cure this NEPA deficiency” were not fulfilled by NRC Staff. *In re Crow Butte Res., Inc.*, 2016 NRC LEXIS 32 at 356 (N.R.C. Dec. 6, 2016). Because it has become unreasonable to believe NRC Staff will take any action inconsistent from the position advocated in the adjudicatory hearing and Court of Appeals, despite rejection by the Board and Commission orders, it is now “appropriate under the circumstances” for this Board to either revoke the license as represented in the briefing or issue a revised initial decision that orders denial of Powertech’s license. *Id.* at 356-357 *citing* 10 C.F.R. § 2.340(e)(2).

I. Conclusion

Despite Commissioner Baran’s strong dissent on the proper relief, the Commission confirmed NHPA and NEPA violations and approved this Board’s decision to allow NRC Staff to correct the NHPA and NEPA violations after the license issued. NRC Staff’s Motion has not identified a scintilla of cultural resources evidence gathered by NRC Staff since the Board issued its Order on April 2015. NRC Staff’s stubborn defiance has left the Board with no choice except to deny NRC Staff’s Motion and vacate the already-issued license based on unresolved NHPA and NEPA violations.

Respectfully Submitted this 1st Day of September 2017,

/s/ Jeffrey C. Parsons
Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738
Fax (303) 823-5732
wmap@igc.org

Travis Stills
Energy & Conservation Law
1911 Main Street, Ste. 238

Durango, CO 81301
(970) 375-9231
stills@frontier.net

Attorneys for Oglala Sioux Tribe

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
POWERTECH (USA) INC.,)	Docket No. 40-9075-MLA
)	
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing UNOPPOSED MOTION FOR EXTENSION OF TIME in the above-captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 1st day of September 2017, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by_____

Jeffrey C. Parsons
Western Mining Action Project

EXHIBIT 1

Subject: RE: Forwarding Letter to President Steele and Mr. Dennis Yellow Thunder re Powertech (USA) Inc.
From: "Jeffrey C. Parsons" <wmap@igc.org>
Date: 12/1/2015 9:27 AM
To: "Jehle, Patricia" <Patricia.Jehle@nrc.gov>, "Jamerson, Kellee" <Kellee.Jamerson@nrc.gov>, <stills@frontier.net>
CC: "Hair, Christopher" <Christopher.Hair@nrc.gov>, "Lewman, Shelbie" <Shelbie.Lewman@nrc.gov>, "Dennis Yellow Thunder" <Dennis@oglalathpo.org>

Yes, thank you Ms. Jamerson. I know that the Oglala Sioux Tribe Office of Cultural Affairs and Historic Preservation is very busy. I believe some of the confusion arises from the lack of a complete response from NRC Staff to the Tribe's most recent letter, which specifically requested NRC Staff's new leadership team to provide a range of dates that would allow for a meeting in the region of the proposed Powertech mine. To date, I am not aware of NRC Staff new team providing any proposed dates. The letter is attached for your reference.
Also, given that this matter is part of an ongoing adjudicatory matter and in an effort to ensure efficient communication between the parties, please copy Mr. Stills and myself on future letters. Thank you.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

From: Jehle, Patricia [mailto:Patricia.Jehle@nrc.gov]
Sent: Tuesday, December 01, 2015 6:39 AM
To: Jamerson, Kellee; wmap@igc.org; stills@frontier.net
Cc: Hair, Christopher; Lewman, Shelbie
Subject: RE: Forwarding Letter to President Steele and Mr. Dennis Yellow Thunder re Powertech (USA) Inc.

Thanks Kellee. And put the email into ADAMS – for immediate release and replication – and it could be added to the hearing update.

Patty

From: Jamerson, Kellee
Sent: Monday, November 30, 2015 5:49 PM
To: wmap@igc.org; stills@frontier.net
Cc: Jehle, Patricia <Patricia.Jehle@nrc.gov>; Hair, Christopher <Christopher.Hair@nrc.gov>; Lewman, Shelbie <Shelbie.Lewman@nrc.gov>
Subject: Forwarding Letter to President Steele and Mr. Dennis Yellow Thunder re Powertech (USA) Inc.

Hello Mr. Parsons and Mr. Stills,

Per the November status report regarding Powertech (USA) Inc., I transmitted a letter with enclosures to President Steele and Mr. Yellow Thunder [(see attached) ML15303A279]. However, I am uncertain whether those letters, email messages, and/or my telephone calls have been received. For this reason, I am forwarding the information to you as the Oglala Sioux Tribe's Counsel. Can you advise whether there have been any changes in contact information?

Regards,

Kellee L. Jamerson

Environmental Scientist

NMSS/FCSE/ERB

U.S. Nuclear Regulatory Commission

8 E-mail: Kellee.Jamerson@nrc.gov

* Phone: (301) 415-7408

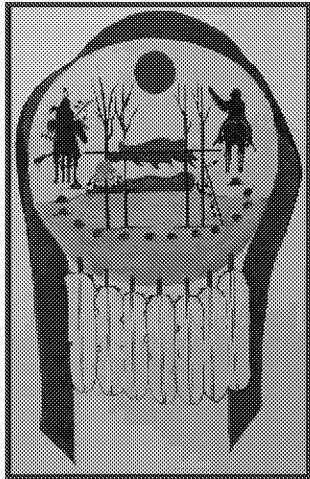
/ Fax: (301) 415-0020

~ Mail Stop: T-4B16

--- Attachments: -----

Sept 24 2015 OST letter to NRC Staff.pdf

183 KB



Oglala Lakota

Cultural Affairs & Historic Preservation

P.O. Box 129, Kyle, SD 57752 (mailing)
7900 Lakota Prairie Drive, Kyle, SD 57752 (physical)
(605) 455-1225 business; (605) 455-1136 fax

Email: dennis@oglalathpo.org

Advisory Council:

Jhon Goes In Center – Member/Chair
Garvard Good Plume, Jr. – Founding Member
Francis 'Chubbs' Thunder Hawk – Ex-Officio Member
Dr. Hannan LaGarry – Ex-Officio Member

In Honor

(In Spirit) Elaine Quiver – Founding Member
(In Spirit) Wilmer Mesteth – Founding Member

Personnel:

Dennis Yellow Thunder – Director / THPO
Mike CatchesEnemy – Tribal Archaeologist
Joni Tobacco – Project Review Specialist
Sara Buckman – Historic Preservation Assistant
Loni Weston – Cultural Resource Specialist
Lisa White Eyes – Cultural Resource Monitor
Jacob Ferguson – Cultural Resource Monitor

September 24, 2015

Marissa G. Bailey, Director
Division of Fuel Cycle Safety, Safeguards and Environmental Review
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Ms. Bailey,

Thank you for your letter dated August 26, 2015 regarding NRC Staff's obligations to reinstitute meaningful consultation and review of cultural resource impacts and mitigation associated with the proposed mine under the National Historic Preservation Act (NHPA), and also the required analysis of these impacts and mitigation measures under the National Environmental Policy Act (NEPA). Your letter helps the Oglala Sioux Tribe's Office of Cultural Affairs and Historic Preservation better understand what appears to have been a substantial restructuring of your bureaucratic organizational chart over the past year.

The Tribe appreciates your offer to help arrange a meeting to introduce the NRC Staff's new management team and to work toward NRC Staff compliance with the ASLB order, which required that "procedures must be put into place to assure that the required NEPA hard look is taken, the NRC's Part 51 environmental regulations are satisfied, and an opportunity for meaningful consultation is provided." LBP-15-16 at 42-43. The Tribe believes that a meeting in the region of the proposed project would be best, perhaps at Pine Ridge. Further, any such meeting should accommodate not only time to discuss the relevant issues with representatives from the Oglala Sioux Tribe, but also with the other Sioux Tribes that have expressed similar concerns with the project, as the Oglala Sioux Tribe believes that the NHPA and NEPA analyses would benefit greatly from better inclusion of the perspectives of these governments and tribal members. As stated in the Oglala Sioux Tribe's previous letter transmitted to you on July 14, 2015, many of the affected Tribes were unsatisfied with and objected to the Programmatic Agreement (PA) upon which NRC principally relied in its prior unsuccessful attempt to satisfy its NHPA and NEPA obligations.

Given the coordination necessary for such a meeting, it would be most beneficial if Ms. Chang, Mr. Ehrlander, and yourself could provide a range of potential dates that would allow for such a meeting, and the Oglala Sioux Tribe can work to help NRC Staff coordinate with all of the interested and affected parties to ensure the fullest level of participation possible.

Respectfully,

/s/ Dennis Yellow Thunder

Dennis Yellow Thunder
Director/THPO OST

Cc: Honorable Oglala Sioux Tribal President John Yellow Bird Steele
Executive Director, Tiger Brown Bull.
Jhon Goes In Center, OSTHPAC Member
Garvard Good Plume, Jr., OSTHPAC Member

File

EXHIBIT 2

From: Jeffrey C. Parsons
To: "Hair, Christopher"; "stills@frontier.net"
Cc: "Vrahoretis, Susan"; "Lewman, Shelbie"; "Jamerson, Kellee"
Subject: RE: RE: RE: Coordination of government-to-government meeting re: Dewey Burdock ISR
Date: Monday, May 2, 2016 1:03:00 PM

Hi Christopher - Ms. Lone Hill is in the process of securing a venue at the Oglala Sioux Tribe government offices in Pine Ridge for the May 19 meeting. She was wondering if NRC Staff had an idea of the number of people that would be in attendance?

Also, we're starting to put together a preliminary/general agenda, which I can circulate to you shortly for input, but please let me know if you have anything specific at this point I should be sure to incorporate. Thanks.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

-----Original Message-----

From: Hair, Christopher [<mailto:Christopher.Hair@nrc.gov>]
Sent: Thursday, April 21, 2016 2:42 PM
To: Jeffrey C. Parsons; stills@frontier.net
Cc: Vrahoretis, Susan; Lewman, Shelbie; Jamerson, Kellee
Subject: RE: RE: RE: Coordination of government-to-government meeting re: Dewey Burdock ISR

Excellent. We'll need to get started on the main details (location, room, etc.) relatively quickly, as these things can take some time on our end. Based on your email, should we reach out to you to figure out these items first?

Thanks. Also, please note I have a new telephone number at 301-287-9152. I've been having some issues with this new number, so please send me an email if you're having trouble reaching me.

Christopher C. Hair
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
MS 015 D21
Washington, D.C. 20555-0001
301-287-9152 (Please note new telephone number) Christopher.Hair@nrc.gov

-----Original Message-----

From: Jeffrey C. Parsons [<mailto:wmap@igc.org>]
Sent: Wednesday, April 20, 2016 3:06 PM
To: Hair, Christopher <Christopher.Hair@nrc.gov>; stills@frontier.net
Cc: Vrahoretis, Susan <Susan.Vrahoretis@nrc.gov>; Lewman, Shelbie <Shelbie.Lewman@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>
Subject: [External_Sender] RE: RE: Coordination of government-to-government meeting re: Dewey Burdock ISR

Thank you for the email, Christopher - the reorganization at the OST tribal historic preservation office is proceeding well. Trina Lone Hill is the new director, and she has informed me that the May 19 would work well on their end for a meeting. I would be happy to coordinate with you, her, and NRC Staff regarding the agenda/details. Ms. Lone Hill has asked whether we could build in an opportunity for other tribes that have had a long-standing interest in the

issue to participate in any way. I suggested to her that we may be able to conduct a meeting with only OST and NRC Staff representatives, followed by an opportunity to update other tribes that show interest. Please let me know if you or NRC Staff have any initial thoughts on this or other matters for discussion. Thank you.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

-----Original Message-----

From: Hair, Christopher [<mailto:Christopher.Hair@nrc.gov>]
Sent: Monday, April 18, 2016 2:15 PM
To: Jeffrey C. Parsons; stills@frontier.net
Cc: Vrahoretis, Susan; Lewman, Shelbie; Jamerson, Kellee
Subject: RE: RE: Coordination of government-to-government meeting re: Dewey Burdock ISR

Good afternoon:

I'm writing to check on the status of the Tribe's availability for the week of May 16th. Please let me know if you need any information from the NRC staff.

Thank you,

Christopher C. Hair
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
MS 015 D21
Washington, D.C. 20555-0001
301-415-2174
301-415-3725 (fax)
Christopher.Hair@nrc.gov

-----Original Message-----

From: Hair, Christopher
Sent: Friday, April 01, 2016 2:23 PM
To: 'Jeffrey C. Parsons' <wmap@igc.org>; 'stills@frontier.net' <stills@frontier.net>
Cc: Vrahoretis, Susan <Susan.Vrahoretis@nrc.gov>; Lewman, Shelbie <Shelbie.Lewman@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>
Subject: RE: RE: Coordination of government-to-government meeting re: Dewey Burdock ISR

Mr. Parsons:

I have confirmed the NRC staff's availability during the week of May 16th. Please let me know how the Tribe would like to proceed.

Thanks,

-Christopher Hair

-----Original Message-----

From: Hair, Christopher

Sent: Thursday, March 31, 2016 3:26 PM

To: 'Jeffrey C. Parsons' <wmap@igc.org>; stills@frontier.net

Cc: Vrahoretis, Susan <Susan.Vrahoretis@nrc.gov>; Lewman, Shelby

<Shelbie.Lewman@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>

Subject: RE: RE: Coordination of government-to-government meeting re: Dewey Burdock ISR

Good afternoon, Jeffrey:

I apologize for the delay in my response, but we are still looking at availability for the week of May 16th. I will confirm our availability as soon as I can. Thanks for your patience!

Sincerely,

Christopher C. Hair

Attorney

Office of the General Counsel

U.S. Nuclear Regulatory Commission

MS 015 D21

Washington, D.C. 20555-0001

301-415-2174

301-415-3725 (fax)

Christopher.Hair@nrc.gov

-----Original Message-----

From: Jeffrey C. Parsons [<mailto:wmap@igc.org>]

Sent: Thursday, March 24, 2016 4:49 PM

To: Hair, Christopher <Christopher.Hair@nrc.gov>; stills@frontier.net

Cc: Vrahoretis, Susan <Susan.Vrahoretis@nrc.gov>; Lewman, Shelby

<Shelbie.Lewman@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>

Subject: [External_Sender] RE: Coordination of government-to-government meeting re: Dewey Burdock ISR

Chris - I have been notified that the Oglala Sioux Tribal Cultural Resources and Historic Preservation Office has, in the last couple weeks, undergone a significant restructuring. Dennis Yellow Thunder is no longer the Tribal Historic Preservation Officer, and a new staff is being interviewed and put in place over the next two weeks. I will let you know and NRC Staff know the new staff contacts on this project as I know them. In any case, I have been informed that this restructuring will have the unfortunate effect of rendering the previously proposed April 25-27 dates unrealistic for the Tribe. I apologize for the timing of this change. I understand that the week of May 16 presents the next availability for a meeting regarding Dewey-Burdock. Can you let me know if/what days that week may work for NRC Staff? Thank you.

Jeffrey C. Parsons

Senior Attorney

Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

-----Original Message-----

From: Hair, Christopher [<mailto:Christopher.Hair@nrc.gov>]
Sent: Tuesday, March 22, 2016 8:07 AM
To: Jeffrey C. Parsons; stills@frontier.net
Cc: Vrahoretis, Susan; Lewman, Shelbie; Jamerson, Kellee
Subject: Re: Coordination of government-to-government meeting re: Dewey Burdock ISR

Good morning:

I'm following up on my previous email to see if we're confirmed for any of the three dates in April.

Thanks,

Christopher C. Hair
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
MS 015 D21
Washington, D.C. 20555-0001
301-415-2174
301-415-3725 (fax)
Christopher.Hair@nrc.gov

-----Original Message-----

From: Hair, Christopher
Sent: Friday, March 11, 2016 1:09 PM
To: 'Jeffrey C. Parsons' <wmap@igc.org>
Cc: stills@frontier.net; Lewman, Shelbie <Shelbie.Lewman@nrc.gov>; Dennis Yellow Thunder <Dennis@oglaithpo.org>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; Vrahoretis, Susan <Susan.Vrahoretis@nrc.gov>
Subject: RE: Re: Coordination of government-to-government meeting re: Dewey Burdock ISR

Good afternoon, Mr. Parsons:

Thanks for your patience regarding our reply. I have confirmed that the NRC staff can support the dates you provided (April 25, 26, & 27th). Kellee Jamerson will be the Staff's contact for organizing the government-to-government meeting. I've copied her on this email, and she can be reached at (301) 415-7408.

In the meantime, please let me know if you have any questions. I look forward to hearing from you.

Sincerely,

Christopher C. Hair

Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
MS 015 D21
Washington, D.C. 20555-0001
301-415-2174
301-415-3725 (fax)
Christopher.Hair@nrc.gov

-----Original Message-----

From: Jeffrey C. Parsons [<mailto:wmap@igc.org>]
Sent: Thursday, March 03, 2016 12:25 PM
To: Hair, Christopher <Christopher.Hair@nrc.gov>
Cc: stills@frontier.net; Lewman, Shelbie <Shelbie.Lewman@nrc.gov>; Dennis Yellow Thunder <Dennis@oglalathpo.org>
Subject: [External_Sender] Re: Coordination of government-to-government meeting re: Dewey Burdock ISR

Christopher, I have been in further contact with Dennis Yellow Thunder regarding dates for a meeting with NRC Staff. April 25, April 26, or April 27 have been identified as potential dates. Please let me know if any of those days might work for NRC Staff. Thank you.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

EXHIBIT 3

From: [Jeffery C. Parsons](#)
To: ["Jamerson, Kellee"; "TrinaLH@oglala.org"](#)
Cc: ["Monteith, Emily"; "Cylkowski, David"; "Travis Stills"](#)
Subject: RE: RE: Review of Summary of January 31, 2017 Teleconference
Date: Friday, March 17, 2017 11:52:00 AM

Kellee, et al – we are working on getting you all information on the Tribe's concepts for a survey approach, as we committed – as well as a date in early April that works for another call. We will let you know as soon as possible. Thanks.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

From: Jamerson, Kellee [<mailto:Kellee.Jamerson@nrc.gov>]
Sent: Tuesday, February 28, 2017 3:25 PM
To: TrinaLH@oglala.org
Cc: Monteith, Emily <Emily.Monteith@nrc.gov>; Cylkowski, David <David.Cylkowski@nrc.gov>; 'Travis Stills' <stills@frontier.net>; Jeffery C. Parsons <wmap@igc.org>
Subject: RE: RE: Review of Summary of January 31, 2017 Teleconference

Ms. Lone Hill,

Thank you for your suggested edits. Changes have been incorporated to the meeting summary, as appropriate. I look forward to hearing from you regarding a date for another teleconference in early April.

Sincerely,

Kellee L. Jamerson

NMSS/FCSE/ERB
301-415-7408

From: Jeffery C. Parsons [<mailto:wmap@igc.org>]
Sent: Monday, February 27, 2017 5:58 PM
To: Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; TrinaLH@oglala.org
Cc: Monteith, Emily <Emily.Monteith@nrc.gov>; Cylkowski, David <David.Cylkowski@nrc.gov>; 'Travis Stills' <stills@frontier.net>
Subject: [External_Sender] RE: Review of Summary of January 31, 2017 Teleconference

Please find OST's proposed edits attached – in track edits. Please let us know if you have questions.

Thanks.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

From: Jeffery C. Parsons [<mailto:wmap@igc.org>]
Sent: Monday, February 27, 2017 12:34 PM
To: 'Jamerson, Kellee' <Kellee.Jamerson@nrc.gov>; 'TrinaLH@ogla.org' <TrinaLH@ogla.org>
Cc: 'Monteith, Emily' <Emily.Monteith@nrc.gov>; 'Cylkowski, David' <David.Cylkowski@nrc.gov>;
'Travis Stills' <stills@frontier.net>
Subject: RE: Review of Summary of January 31, 2017 Teleconference

Thank you Kellee – we are working to get you edits on the meeting summary today. We are also in the process of pinning down dates in early April that work for another meeting. Note that I have also added Mr. Stills to this string, to keep him in the loop. Thanks.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

From: Jamerson, Kellee [<mailto:Kellee.Jamerson@nrc.gov>]
Sent: Thursday, February 23, 2017 2:24 PM
To: TrinaLH@ogla.org
Cc: Jeffery C. Parsons <wmap@igc.org>; Monteith, Emily <Emily.Monteith@nrc.gov>; Cylkowski, David <David.Cylkowski@nrc.gov>
Subject: Review of Summary of January 31, 2017 Teleconference

Hello Ms. Lone Hill,

Thank you for meeting with the U.S. Nuclear Regulatory Commission (NRC) staff via teleconference on January 31, 2017 to continue consultation regarding a proposed tribal survey at the Dewey-Burdock In Situ Uranium Recovery (ISR) Project site. By e-mail dated

February 8, 2017, the NRC staff provided a draft meeting summary for your review (see attached). We hope to receive any comments you may have regarding the meeting summary by Monday, February 27, 2017. We plan to include this summary in our next status update to the Atomic Safety and Licensing Board on March 1, 2017.

Additionally, we agreed to have another teleconference in early April. The NRC staff is looking to schedule that meeting the week of April 3, 2017. Please let me know what date, if any, during that week will work for your schedule. Thanks!

Sincerely,


Kellee L. Jamerson


Environmental Scientist

NMSS/FCSE/ERB

U.S. Nuclear Regulatory Commission

 E-mail: Kellee.Jamerson@nrc.gov

 Phone: (301) 415-7408

 Fax: (301) 415-0020


 Mail Stop: T-4B16

EXHIBIT 4

From: Jeffery C. Parsons
To: "Cylkowski, David"
Cc: "Monteith, Emily"; "Diaz Toro, Diana"; "Jamerson, Kellee"; "Roman-Cuevas, Cinthya"; "TrinaLH@oglala.org";
"Travis Stills"; "McFadden, Lane (ENRD)"
Subject: RE: Letter regarding coordination of a tribal survey at the Dewey-Burdock in situ uranium recovery project.
Date: Wednesday, May 17, 2017 2:46:00 PM

Thank you for the re-issued letter, David. Based on my understanding, Ms. Lone Hill was out of the THPO position starting April 12 and only this week has had her office emails and phone systems re-established. Further, as you may know, the U.S. EPA has set May 19 as the deadline for comprehensive comments on the draft Underground Injection Control (UIC) permits for the Dewey-Burdock Project. The posted record for those draft permits includes thousands of pages of materials: <https://www.epa.gov/uic/dewey-burdock-permit-application>

As a result, the Tribe's resources devoted to the Dewey-Burdock issues are currently fully utilized in reviewing the records and preparing comments on the EPA UIC draft permits. As a result, the Tribe anticipates a response to NRC Staff's letter no later than May 31. Hopefully, NRC Staff understands this situation and can accommodate this relatively short delay.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

From: Cylkowski, David [mailto:David.Cylkowski@nrc.gov]
Sent: Monday, May 8, 2017 12:49 PM
To: Jeffery C. Parsons <wmap@igc.org>
Cc: Monteith, Emily <Emily.Monteith@nrc.gov>; Diaz Toro, Diana <Diana.Diaz-Toro@nrc.gov>;
Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; Roman-Cuevas, Cinthya <Cinthya.Roman-Cuevas@nrc.gov>; TrinaLH@oglala.org; 'Travis Stills' <stills@frontier.net>; 'McFadden, Lane (ENRD)' <Lane.McFadden@usdoj.gov>
Subject: RE: RE: Letter regarding coordination of a tribal survey at the Dewey-Burdock in situ uranium recovery project.

Mr. Parsons,

Thank you for your April 28, 2017 email informing us of the status of the Oglala Sioux Tribe's Tribal Historic Preservation Office personnel.

Following receipt of your email, the NRC Staff contacted the Advisory Council on Historic Preservation, the State Historic Preservation Office, and the Oglala Sioux Tribe's Natural Resources Regulatory Agency in an effort to identify the appropriate point of contact for the Oglala Sioux Tribe. Based on the Staff's efforts, it is our understanding that Ms. Lone Hill was not serving as the Tribal Historic Preservation Officer for approximately one week. We

understand that Ms. Lone Hill then returned to her position as Tribal Historic Preservation Officer and is currently serving in that position. Please let us know if our understanding of the Tribal Historic Preservation Office's current personnel situation is incorrect.

As a result of these unforeseen circumstances, the Staff plans to reissue its April 14, 2017 offer of a survey opportunity of the Dewey-Burdock Project area and extend the date by which a response is requested to May 19, 2017. The Staff also plans to extend the available dates for a site survey to include August 2017. The Staff plans to reissue the offer letter before the close of business today.

Best regards,

David Cylkowski
Counsel for the NRC Staff

David Cylkowski

Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
301.287.9125 | David.Cylkowski@nrc.gov | O15-A37

From: Jeffery C. Parsons [<mailto:wmap@igc.org>]

Sent: Friday, April 28, 2017 12:48 PM

To: Monteith, Emily <Emily.Monteith@nrc.gov>; Cylkowski, David <David.Cylkowski@nrc.gov>

Cc: Diaz Toro, Diana <Diana.Diaz-Toro@nrc.gov>; Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; 'Travis Stills' <stills@frontier.net>; 'McFadden, Lane (ENRD)' <Lane.McFadden@usdoj.gov>

Subject: [External_Sender] RE: Letter regarding coordination of a tribal survey at the Dewey-Burdock in situ uranium recovery project.

Ms. Monteith and Mr. Cylkowski, I wanted to reach out to you regarding NRC Staff's letter earlier this month regarding the Dewey-Burdock matter. I have been informed that Ms. Lone Hill is no longer Tribal Historic Preservation Officer of the Oglala Sioux Tribe. Unfortunately, this change in the Tribe's lead staff will necessarily result in some delay as new personnel are put in place and brought up to current. As such, a finalized response by May 5, as requested in your letter, is not realistic. The Tribe remains committed to continuing the dialogue on coordinating a survey of the Dewey-Burdock property and, although unable to finalize until staff is in place, nevertheless continues to work on a response to your letter. Based on the concepts the parties discussed over our previous conference call and in-person meeting, the response will expand on the Tribe's stated position that key features of a survey should include a qualified contractor to coordinate a survey among the several interested Sioux Tribes based on accepted methodologies and professional standards to identify cultural, religious, and historic resources and the potential adverse effects to those resources. Although this approach contrasts with the most recent NRC Staff proposal, which appears identical to the informal walk-through proposed during the administrative proceedings and disapproved by every affected Sioux Tribal government, the Tribe continues to hold optimism that NRC Staff and the Tribe can reach agreement on a viable survey method. The Tribe understands

NRC Staff's desire to keep things moving, and shares that interest. I will keep you posted on the status of the situation and let you know as soon as possible when we expect to have a response to you.

As this email responds to emails sent by your client to the Oglala Sioux Tribe regarding a matter that is now in federal court litigation, please kindly include myself and Mr. Stills (attorneys of record) on all NRC Staff communications regarding the matter.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

From: Diaz Toro, Diana [<mailto:Diana.Diaz-Toro@nrc.gov>]

Sent: Friday, April 14, 2017 3:17 PM

To: TrinalH@oglaala.org

Cc: Jamerson, Kellee <Kellee.Jamerson@nrc.gov>; Monteith, Emily <Emily.Monteith@nrc.gov>; Cylkowski, David <David.Cylkowski@nrc.gov>; wmap@igc.org

Subject: Letter regarding coordination of a tribal survey at the Dewey-Burdock in situ uranium recovery project.

Ms. Lone Hill,

Please, find attached a courtesy copy of a letter we have sent the Oglala Sioux Tribe regarding coordination of a tribal survey at the Dewey-Burdock in situ uranium recovery project site.

Regards,
Diana

Diana Diaz-Toro
Project Manager
NMSS/FCSE
301-415-0930
diana.diaz-toro@nrc.gov

EXHIBIT 5

From: Monteith, Emily
To: Jeffrey C. Parsons; "Travis Stills"
Cc: Cylkowski, David
Subject: RE: RE: Consultation regarding motion for summary disposition of Powertech proceeding Contentions 1A and 1B
Date: Thursday, August 3, 2017 3:36:38 PM

Jeff,

Thank you for your response. We believe that filing the Staff's motion today remains the most appropriate next step, consistent with our understanding of the requirements of 10 CFR 2.323. Our motion will reflect that the Oglala Sioux Tribe intends to oppose the motion. The motion will also provide the Staff's position regarding the additional factual matters you raise related to the Tribe's May 31, 2017 letter.

Should you decide to request an extension of time for the Tribe to file a response to the Staff's motion for summary disposition, you may convey in your motion to the Board that the Staff does not oppose an extension of time to September 1 for the filing of your response.

Best wishes,
Emily

From: Jeffrey C. Parsons [mailto:wmap@igc.org]
Sent: Wednesday, August 02, 2017 5:20 PM
To: Monteith, Emily <Emily.Monteith@nrc.gov>; 'Travis Stills' <stills@frontier.net>; harmonicengineering1@mac.com; 'Bruce Ellison' <belli4law@aol.com>; 'Anthony Thompson' <ajthompson@athompsonlaw.com>; 'Chris Pugsley' <cpugsley@athompsonlaw.com>; 'David Frankel' <davidcoryfrankel@gmail.com>
Cc: Cylkowski, David <David.Cylkowski@nrc.gov>; 'McFadden, Lane (ENRD)' <Lane.McFadden@usdoj.gov>
Subject: [External_Sender] RE: Consultation regarding motion for summary disposition of Powertech proceeding Contentions 1A and 1B

Thank you, Emily. The Tribe intends to oppose the Motion you describe and does take issue with portions of the factual statement provided. I understand your asserted rationale in filing by Aug 3, based on the language in 10 CFR 2.323(a)(2). However, we do not read the NRC letter as an event that triggers the 10 day filing deadline. In fact, the Tribe continues to believe that there remains considerable opportunity to discuss and reach agreement on a survey approach. Never has the Tribe insisted on a 2-year study (as intimated by NRC Staff's Statement of Facts), nor even necessarily the 8-month study indicated by NRC Staff's own expert witness as identified in the Tribe's May 31, 2017 letter. Rather, the Tribe put forth those examples as a part of its detailed explanation of the consistent bases it, and all of the other Lakota Sioux tribes, have communicated to NRC Staff for years for rejecting the same open-site approach that NRC has proposed to no avail since 2012. These examples also serve to communicate key criteria of the Tribe's preferred survey approach. The Tribe expects and requests that NRC Staff would at least communicate the specific bases for refusing to engage in any discussion of any approach other than its same open-site approach. Thus, the Tribe reiterates its request that NRC Staff resume negotiations in the good faith and reasonable manner contemplated by the NHPA.

Similarly, we are not convinced that the Commission, ASLB, or the NRC Staff retains jurisdiction to hold further proceedings in this licensing matter, which is pending in the D.C. Court of Appeals based on a final agency action by the Commission. Any discussion of retained NRC jurisdiction should necessarily involve the Department of Justice attorneys, who we have copied on this response.

However, should you decide to file on August 3, the Tribe plans to file a motion seeking an extension of time for the response. Due to scheduled out of town family vacation starting Aug 3 through Aug 12, I will not be able to work on a Response until Aug 13 at the earliest. I also have oral argument in another case in the Arizona federal District Court in Phoenix (Case No. 16-cv-03115) before Judge Campbell scheduled for Aug 23, with associated preparation and travel expected to consume virtually the entirety of the week of Aug 21st. Mr. Stills has pushed back previously scheduled deadlines due to a death in the family, including a major brief due in the Colorado District Court on August 18. As such, I would like to discuss an extension of time, up to September 1 to file the response.

Jeffrey C. Parsons
Senior Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
(303) 823-5738

From: Monteith, Emily [<mailto:Emily.Monteith@nrc.gov>]
Sent: Monday, July 31, 2017 5:46 PM
To: 'Travis Stills' <stills@frontier.net>; Jeffery C. Parsons <wmap@igc.org>; harmonicengineering1@mac.com; Bruce Ellison <helli4law@aol.com>; Anthony Thompson (ajthompson@athompsonlaw.com) <ajthompson@athompsonlaw.com>; Chris Pugsley (cpugsley@athompsonlaw.com) <cpugsley@athompsonlaw.com>
Cc: Cylkowski, David <David.Cylkowski@nrc.gov>
Subject: Consultation regarding motion for summary disposition of Powertech proceeding Contentions 1A and 1B

Counselors,

On July 24, the Staff issued a letter to the Oglala Sioux Tribe responding to the Tribe's letter dated May 31 regarding further consultation to effectuate a survey of the Dewey-Burdock project area for sites of cultural, historic and religious importance to the Tribe. As the Staff indicated in its letter, we believe that further consultation with the Oglala Sioux Tribe is not likely to result in a mutually acceptable settlement of the dispute regarding the outstanding contentions.

Therefore, pursuant to the Board's Partial Initial Decision dated April 30, 2015, we intend to file a motion for summary disposition of Contentions 1A and 1B. We intend to file the

motion on August 3, ten days from the issuance of the Staff's letter to the Tribe, to comply with the timeframe for the filing of motions set forth in 10 CFR 2.323(a)(2).

In accordance with 10 CFR 2.323(b), we request that you advise whether you support or oppose the Staff's plan to file the motion. To aid in your consideration, we have attached to this email the list of material facts about which the Staff believes there is no genuine dispute.

Feel free to contact me or David Cylkowski if you wish to discuss this matter further.

Best wishes,
Emily

Emily Monteith
U.S. Nuclear Regulatory Commission
Office of the General Counsel
OWFN O-15A27
Mail Stop O-14A44
(301) 287-9119
Emily.Monteith@nrc.gov

Official Use Only - The information contained in this message may be protected by the **attorney-client privilege** or as **attorney work product**. Please immediately reply to the sender of this e-mail if you have received it in error, then delete it.